76-1234

No.

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1976

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PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

BARBARA ROSS, ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# In the Supreme Court of the United States

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No.

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

BARBARA ROSS, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

The Solicitor General, on behalf of the Secretary of Housing and Urban Development and the other federal defendants, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-3a) is not reported. The opinion of the district court upon entering a preliminary injunction is reported at 396 F. Supp. 278 (App. C,

*infra*, pp. 6a-26a), and its opinion rendered in connection with entry of a final judgment is reported at 405 F. Supp. 831 (App. D, *infra*, pp. 27a-37a).

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 4a) was entered on October 6, 1976. On December 29, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to February 3, 1977. By order of January 26, 1977, the Chief Justice further extended the time within which to file the petition to March 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether 12 U.S.C. (Supp. V) 1715z-1(f)(3) required the Secretary of Housing and Urban Development to establish an operating subsidy program.

## STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this petition (App. E, *infra*, pp. 38a-43a).

## STATEMENT

1. Section 236 of the National Housing Act, as added, 82 Stat. 498, and amended, 12 U.S.C. (1970 ed. and Supp. V) 1715z-1, is designed to encourage private enterprise to develop rental and cooperative

housing for lower income families. To this end, the statute provides for three programs—the "interest reduction" (12 U.S.C. 1715z-1(a)), "deep subsidy" (12 U.S.C. (Supp. V) 1715z-1(f)(2)), and "operating subsidy" (12 U.S.C. (Supp. V) 1715z-1 (f)(3)) programs.[1] The operating subsidy program would provide for periodic payments, on behalf of tenants who pay more than 25 percent of their income in rent, to the owner of a qualifying housing project to offset increases in utility charges and local property taxes. The effect of such payments would be to reduce the amount by which the tenants rentals would otherwise have to be increased on account of such increased costs.

Like all other programs established under Section 236, the operating subsidy program would require the use of "contract authority". See *Train* v. *City of New York*, 420 U.S. 35, 39 n. 2. Congress first specifies the total dollar amount of contracts that may be undertaken for a given program ("authorized contract authority") and, by subsequent appropriation statutes, permits the Secretary to use specified amounts of that authorized contract authority ("released contract authority") for a given fiscal year or other specified period of time. From

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[1] The "interest-reduction" program provides assistance in paying the interest on a project mortgage, and the "deep subsidy" program permits very low income tenants to occupy units in a project by defraying their rental expense to the extent that it exceeds 25 percent of income.

time to time thereafter, Congress appropriates the funds necessary to satisfy contractual obligations entered into pursuant to released contract authority ("the liquidation funds").[2] Congress has not appropriated released contract authority for the Section 236 programs since 1972 (Pub. L. 92-383, 86 Stat. 540).

The released contract authority at the beginning of fiscal year 1976 was approximately $125 million.[3] It was estimated that operation of the deep subsidy program, which the Secretary was required to establish (12 U.S.C. (Supp. V) 1715z-1(f)(2)), would require the obligation of $50 million in that year alone. It was further estimated that the Secretary's commitments under the interest reduction program would require $74.8 million,[4] and that

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[2] Appropriated funds are supplemented by a special revolving fund ("the reserve fund"), consisting of payments from project owners to the Secretary of amounts collected in excess of "basic rental charges." See 12 U.S.C. (Supp. V) 1715z-1(g). Prior to August 1976, this fund could be used only for payment of operating subsidies; now it may be used for other housing programs as well. Pub. L. 94-378, 90 Stat. 1095, 1096. We are informed by the Secretary that as of December 31, 1976, the reserve fund contained approximately $54.4 million.

[3] The account given here of the Section 236 programs and related matters is set forth with supporting affidavits in the Secretary's application to this Court for a stay pending appeal in *Hills* v. *Underwood*, C.A. D.C., Nos. 76-1603 and 76-1650, which was granted on October 18, 1976. A copy of that stay application is being furnished to counsel for respondents.

[4] Although the interest reduction program was suspended in January 1973, outstanding commitments made prior

implementation of the operating subsidy program would cost an additional $53.7 million for that fiscal year. Thus the released contract authority was insufficient to cover both the outstanding commitments under the interest reduction program and implementation of the operating subsidy program. The Secretary decided to honor the outstanding commitments and not to establish the operating subsidy program.

2. Respondents are tenants of the Uplands Apartments, Baltimore, Maryland, a housing project that receives interest-reduction assistance pursuant to Section 236. They commenced this suit against the Secretary and others [5] in the United States District Court for the District of Maryland, requesting prospective implementation of an operating subsidy program for the project. On May 16, 1975, the district court certified a class comprised of all tenants at Uplands who would be benefited by payment of the subsidy and granted a preliminary injunction requiring the Secretary to make subsidy payments to the project (App. C, *infra*, pp. 6a, 11a, 25a-26a). On December 31, 1975, the district court granted a permanent injunction (App. D, *infra*, p. 37a).

In its two opinions, the district court reasoned that the Secretary could have made operating subsidy payments, in excess of the amount of released

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to that suspension were estimated to require utilization of $74.8 million in contract authority for fiscal year 1976 alone.

[5] The project owner, Community Services, Inc., other private persons, and other HUD officials were named as parties defendant (App. C, *infra*, p. 6a).

contract authority, from a special reserve fund (see note 2, *supra*), and therefore was required to make such payments by the statute (App. C, *infra*, pp. 19a-23a; App. D, *infra*, pp. 33a-37a). The court of appeals affirmed on the basis of the district court's opinions (App. A, *infra*, p. 3a).

## REASONS FOR GRANTING THE PETITION

This case involves an important question of national housing policy that this Court should resolve. Implementation of the operating subsidy program would cost the federal government more than $50 million annually, and under the current statutory scheme those funds could be obtained only by diverting them from other housing programs that the Secretary has determined to be more efficient.[6] The question presented here has arisen in at least 30 cases,[7] has been

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[6] The only question involved here is whether available funds should be allocated to the operating subsidy program or to other Section 236 programs; the question is not whether appropriated funds will be spent. Thus, this case does not involve any claim that funds have been improperly impounded.

[7] *E.g.*, *Nellie Johnson, et al.* v. *Hills, et al.*, Civil Action No. N-76-979 (S.D. Fla., January 20, 1977); *Elmer Rush* v. *Mt. Nebo, Inc.*, Civil Action No. C 76-665A (N.D. Ga., filed April 14, 1976, dismissed September 21, 1976); *Malcolm Utz, et al.* v. *Department of Housing and Urban Development*, Civil Action No. C-1-76-272 (S.D. Ohio, July 21, 1976); *Emma Serrano, et al.* v. *Hills, et al.*, Civil Action No. 76-Civ-1665 (S.D. N.Y., filed April 9, 1976); *Dussault* v. *Hills*, Civil Action No. C-76-147 (D. N.H., May 28, 1976, preliminary injunction vacated January 3, 1977); *Phyllis Campbell, et al.* v. *Department of Housing and Urban Development, et al.*, Civil Action No. C-75-471 (N.D. Ohio, August 18, 1976);

litigated in two courts of appeals,[8] and presently is before two other courts of appeals.[9]

1. Nothing in the statute requires the Secretary to implement the operating subsidy program. The statutory language is permissive, not mandatory: the Secretary "is authorized to make, and contract to make" operating subsidy payments. 12 U.S.C. (Supp. V) 1715z-1(f)(3).[10] The District of Columbia Circuit has recognized that this language, as it applies to the interest-reduction program (12 U.S.C. 1715z-1(a)), conferred upon the Secretary discretion to decline to implement that program when she reasonably determined that its implementation

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*Gertsch* v. *Hills*, 414 F. Supp. 15 (D. Utah); *Parker Square Tenants Assn.* v. *Hills*, Civil Action No. 75-CV 577-W-3 (W.D. Mo., January 27, 1976); *Taunton Gardens Co.* v. *Hills*, 421 F. Supp. 524 (D. Mass.).

[8] In addition to the decision below, the issue was decided adversely to the Secretary in *Abrams* v. *Hills*, C.A. 9, No. 76-2095, decided December 1, 1976. The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Abrams*.

[9] In *Underwood* v. *Hills*, C.A.D.C., Nos. 76-1603 and 76-1650 (appeals pending), the district court entered a nationwide order requiring retroactive payment of operating subsidies (414 F. Supp. 526). This Court stayed the district court order on October 18, 1976. In *Dubose* v. *Hills*, C.A. 2, No. 76-1607 (appeal pending), the district court ordered implementation of the operating subsidy program in Connecticut. The court of appeals stayed that order, and on February 22, 1977, this Court refused to vacate that stay.

[10] In contrast, the provision establishing the deep subsidy program states that the Secretary "shall make, and contract to make" deep subsidy payments. 12 U.S.C. (Supp. V) 1715z-1(f)(2).

would interfere with other housing goals. *Commonwealth of Pennsylvania* v. *Lynn*, 501 F. 2d 848 (C.A. D.C.). A similar conclusion is warranted here: the Secretary is vested with discretion to decide not to implement the operating subsidy program.

The Secretary did not abuse her discretion in making that decision. Congress has not released sufficient contract authority to permit both the payment of outstanding commitments under the interest-reduction program and implementation of the operating subsidy program (see pages 4-5, *supra*). The Secretary therefore was confronted with the necessity of choosing between those two alternatives. The Secretary concluded that she should honor her interest-reduction commitments.

Before the interest-reduction program was suspended in January 1973 (see *Commonwealth of Pennsylvania* v. *Lynn*, *supra*), the Secretary had represented to state and local authorities and private developers that she would assist certain planned housing projects under that program; those entities had relied upon her representations in proceeding with the planning and construction of such projects (Carla Hills Affidavit of December 29, 1975, pp. 2-5).[11] The Secretary's failure to use her limited contract authority to carry out these existing commitments to state and local authorities and private developers "would [have] create[d] chaotic conditions" and defeated their substantial, and justified, reliance (*id.* at 3).

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[11] This Affidavit is part of the record in this case.

In addition, the Secretary concluded that the decision to honor existing interest-reduction commitments would better serve the consistently expressed desire of Congress that Section 236 contract authority be utilized to increase housing production for low-income families:[12] the interest-reduction program, by reducing the effective cost of project mortgages, encourages the production of new housing for low-income families, whereas the operating subsidy program, which does no more than absorb a portion of the increased utility charges and local property taxes that otherwise would be passed on to tenants in the form of higher rentals, does nothing to stimulate further building.[13]

Moreover, the Secretary believed that the operating subsidy program would be excessively costly

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[12] H.R. Rep. No. 93-1139, 93d Cong., 2d Sess. 4 (1974); S. Rep. No. 93-1056, 93d Cong., 2d Sess. 6-8 (1974).

[13] The Secretary further determined that alternative programs would more efficiently achieve the aims of the operating subsidy program. For example, the "Section 8 set-aside program" (United States Housing Act of 1937, Section 8, as amended, 88 Stat. 653, 662, 42 U.S.C. (Supp. V) 1437f; 24 C.F.R. Part 886) provides rent assistance that eliminates the need for operating subsidies. The families in projects receiving the benefit of Section 8 assistance pay no more than twenty-five percent of their adjusted income toward rent. They would thus not be eligible for operating subsidies, which are payable only on behalf of tenants paying more than twenty-five percent of their income for rent. The Secretary advises us that Section 8 aid currently is being provided to 111,448 housing units and that existing contracts for Section 8 assistance require obligation of $158 million in contract authority.

to administer, since it would require constant recalculations not only of the actual and reasonable increases in utility costs and local taxes for each project but also of the subsidy levels for each tenant. This administrative burden would be shared by the project owners. Any increase in a project owner's administrative costs probably would eventually be passed on to all his tenants, not just those receiving the subsidy, in the form of higher rents. See 12 U.S.C. (Supp. V) 1715z-1(f)(1) and 1715z-1(e). Those increases could substantially offset any benefit tenants might otherwise experience from payment of the subsidy.

2. Contrary to the ruling of the court of appeals, the lack of available contract authority cannot be cured by making payments for operating subsidies out of the reserve fund created by 12 U.S.C. (Supp. V) 1715z-1(g). The level of expenditures for Section 236 programs always has been limited to the amount of released contract authority (see page 3, *supra*), as Congress presumably knew when it granted the Secretary authority to establish the operating subsidy program. Nothing suggests that Congress intended, by establishing the reserve fund, to create an exception to this rule. The fund is merely an ancillary source of liquidating funds.

Moreover, after two years of accumulation, the available money in the reserve fund is insufficient to implement the operating subsidy program for even

a single year.[14] The fact that the reserve fund is incapable of supporting a continuing program further indicates that the fund was not intended to be a statutory basis for paying operating subsidies without regard to limitations on contract authority.

The recent passage of Pub. L. 94-378, 90 Stat. 1095, 1096, further illustrates that the reserve fund is merely a liquidation fund for the payment of contracts entered into pursuant to released contract authority. That statute provides that as of October 1, 1976, the reserve fund "shall be available, in addition to the amounts appropriated herein, for the payments on contracts entered into pursuant to [Section 236 and other specified housing programs]."[15] By specifying that the reserve fund is available for "payments on contracts," the new law confirms that the release of contract authority is a prerequisite to utilization of the fund.

3. Even if the Secretary were to expend the entire reserve fund on the operating subsidy program, the

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[14] The Secretary estimates that implementation of the program would cost $53.7 million per year. As of December 31, 1976, there was approximately $54.4 million in the reserve fund, but some $18 million of that represented erroneous payments made by project owners. See the *Underwood* stay application, p. 6. The district court in *Underwood* held that the Secretary could refund the overpayments to the project owners; the plaintiffs in *Underwood* are challenging that holding on appeal.

[15] However, under an order of the District of Columbia Circuit, the Secretary is enjoined from making the fund available for any program other than the operating subsidy program pending the outcome of *Underwood* v. *Hills*, *supra*.

program could remain in effect for less than one year. Indeed, retroactive payments would exhaust the fund within one month.[16] Thus the consequence of implementing the program would be to incur substantial administrative costs, only to abandon the program a few months later.[17]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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HARRIET S. SHAPIRO,
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MARCH 1977.

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[16] See the *Underwood* stay application, p. 10 n. 8, p. 12. Although no retroactive payments are involved in this case, they are at issue in *Abrams* v. *Hills*, *supra* and *Underwood* v. *Hills*, *supra*.

[17] In order to implement the program, the Secretary would be required, *inter alia*, to evaluate each of the more than 400,000 units receiving Section 236 aid, and this evaluation would require more than 161 man-years of agency effort. See the *Underwood* stay application, pp. 14-15.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 76-1294

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BARBARA ROSS, ET AL., APPELLEES

*v.*

COMMUNITY SERVICES, ET AL., APPELLEES

AND

CARLA A. HILLS, Individually and in her capacity as Secretary of the Department of Housing and Urban Development, ET AL., APPELLANTS

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

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(Argued May 6, 1976 Decided October 6, 1976)

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Before BRYAN, Senior Circuit Judge, CRAVEN, Circuit Judge, and WYZANSKI, Senior District Judge.*

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* Sitting by designation.

PER CURIAM:

The Secretary of the Department of Housing and Urban Redevelopment appeals the determination of the District Court that she is *required* by section 236(f)(3)[1] of the National Housing Act,[2] as amended by the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633, to make operating subsidy payments to a low income housing project from a reserve fund established under section 236(g)[3] of that Act. The Secretary had refused to do so, and this suit was brought by the tenants of such a project, Uplands Apartments, Baltimore, Maryland, to enjoin continued refusal and to obtain the benefits of the subsidy.

It is the Secretary's position that she is vested with the discretion to refrain from making such payments and that here her declination was warranted. Further, she also pleaded a lack of authority to make them. The District Court concluded that she was entirely free to grant the subsidies and that she had offered no justifiable grounds for not paying them. To this end a preliminary injunction then issued directing the Secretary to apply to the use of the Uplands Apartments so much of the moneys held in the reserve fund, under section 236(g), as was available for the payment of operating subsidies. That injunction was made permanent on January 26, 1976 from which order this appeal is taken.

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[1] 12 USC § 1715z-1(f)(3).

[2] 12 USC § 1701 et seq.

[3] 12 USC § 1715z-1(g).

In the District Court, Judge Harvey expounded with clarity the intent of these statutes and fully laid out the obligations of the Secretary thereunder, as well as the entitlements of the tenants and the project owners. Ross v. Community Services, Inc., 405 FS 831 (December 1975) and 396 FS 278 (DC Md. May 1975). On our consideration of the record and the briefs, as well as the supplemental memoranda submitted by counsel, we perceive no inaccuracy in the District Judge's outline of the facts, or any infirmity of law, or a want of equity in his determinations. The decision of the District Court will not be disturbed.

Affirmed.

**APPENDIX B**

## UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 76-1294

[Filed Oct. 6, 1976, William K. Slate, II, Clerk]

BARBARA ROSS, ELLA SPARKS, KATHLEEN M. ARMES, BERNICE JOHNSON, BEVERLY STEWART, CYNTHIA JACKSON, DORIS JOHNSON, BARBARA CAMPBELL, CAROL STOVER, plaintiffs, individually and as representatives of a class, APPELLEES

*versus*

COMMUNITY SERVICES, INC., UPLANDS ASSOCIATES A, a Maryland Limited Partnership, UPLANDS ASSOCIATES B, a Maryland Limited Partnership, MORTON SARUBIN, Individually and doing business as Uplands Associates, APPELLEES

*and*

CARLA A. HILLS, Individually and in her capacity as Secretary of the Department of Housing and Urban Development, H. R. CRAWFORD, individually and in his capacity as Assistant Secretary for Housing Management of the Department of Housing and Community Development and EVERETT H. ROTHSCHILD, Individually and in his capacity as Acting Director of the Baltimore Area Office, Department of Housing and Urban Development, APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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## JUDGMENT

THIS CAUSE came on to be heard on the record from the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

**APPENDIX C**

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. H-75-506

BARBARA ROSS ET AL., PLAINTIFFS, Individually and as representatives of a class

*v.*

COMMUNITY SERVICES, INC., ET AL., DEFENDANTS

May 16, 1975

## MEMORANDUM OPINION

ALEXANDER HARVEY, II, District Judge:

Plaintiffs are low income tenants at the Uplands Apartments complex, which is located in Baltimore City and is a federally insured and assisted housing project under Section 236 of the National Housing Act. In this class action, plaintiffs seek to compel the Secretary of the Department of Housing and Urban Development (hereinafter "HUD") to implement and disburse operating subsidies under Section 212 of the Housing and Community Development Act of 1974) hereinafter the "1974 Housing Act"), 12 U.S.C. § 1715z-1. Plaintiffs also seek to enjoin the collection of a rent increase approved by HUD, effective May 1, 1975. Jurisdiction has been asserted pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-704; the National Housing Act, 12

U.S.C. § 1701 *et seq.*; and 28 U.S.C. §§ 1331, 1337 and 1361. Named as defendants are the owners and manager of the apartments (hereinafter "the private defendants") and various HUD officials, including the Secretary of HUD.

On August 22, 1974, Congress enacted the 1974 Housing Act. Section 212 of that Act amended Section 236(f) of the National Housing Act by authorizing the Secretary to make additional assistance payments (or operating subsidies) to Section 236 project owners in order to cover increased utility costs and property taxes exceeding the project's operating expense level. Section 236 of the National Housing Act affords rental housing opportunities to low income families by providing mortgage insurance and interest reduction payments to mortgagees on behalf of project owners of newly constructed and rehabilitated housing. The private defendants here are such project owners.

The initial operating expense level in the amended statute equals the sum of utility costs and property taxes payable by the project owner at the time the Secretary determines that the project is fully occupied. For projects receiving mortgage insurance and interest subsidies before August 22, 1974, an initial operating expense level must be established by the Secretary not later than 180 days after that date, or by February 14, 1975. The additional subsidy payments may be made to a Section 236 project owner only where there are tenants residing in the project who pay more than 30 per cent of their in-

come for rent. The maximum authorized operating subsidy is the amount necessary to reduce the rental charges of tenants paying more than 30 per cent of their income for rent down to 30 per cent of their income.

Section 212 also amended Section 236(g) of the National Housing Act by authorizing the Secretary to use excess rentals collected from project owners for the payment of these operating subsidies. Section 236(g) provides that the Secretary shall credit such excess rental charges to a reserve fund. Any balance in the reserve fund is to be used for the payment of the operating subsidies. The Secretary has decided, for reasons to be discussed more fully later, not to implement the provisions of Sections 236(f) and (g) in any way.

On March 28, 1975, HUD approved the private defendants' request for a rental increase. According to a letter from the Baltimore Area Director, the rent increase was attributable to "increased costs for utilities, real estate [taxes] and other justified operational costs." Shortly after the approval, plaintiffs were notified that their rents would be increased by 18 per cent effective May 1, 1975. Should plaintiffs and their class be required to pay this rent increase, they will have to use more than 30 per cent of their income to pay rental charges.

Plaintiffs assert that the increased cost of their rent is a cost which Congress mandated that the government must subsidize under Section 212 of the 1974 Act. They contend that the entire amount of these of 1974 hereinafter the "1974 Housing Act"). 12

costs are not costs properly payable by Section 236 project tenants through increased rentals. Plaintiffs seek a declaration that HUD's approval of the rent increase was unlawful and that HUD owes plaintiffs a duty under Section 212 to provide operating subsidies to the owners of the housing project. Plaintiffs have sought preliminary and permanent injunctive relief and a writ of mandamus compelling the HUD defendants to disburse an operating subsidy to the owners of the project.

Presently before the Court are plaintiffs' motion for a preliminary injunction and cross motions for summary judgment filed by the parties, as well as certain other motions. Suit was filed herein on April 22, 1975, and a Temporary Restraining Order was entered by Judge Young on April 28, 1975, prohibiting the private defendants from initiating ejectment proceedings to evict tenants who did not pay the challenged rent increases until further proceedings could be held in this case. The Temporary Restraining Order has now been extended until May 18, 1975, and because of the extreme urgency of this matter, rigid briefing schedules were set by the Court, briefs and affidavits and exhibits have been filed, and a full hearing has been held on the various motions that are pending.

The private defendants are placed directly in the middle by these proceedings. Plaintiffs and their class claim that HUD should pay all of the increased rentals, or that the increases should be rescinded. HUD claims that the tenants should pay the increase.

Meanwhile, no one is paying, and the private defendants have been judicially restrained from evicting the plaintiffs and from collecting the rent increase from the plaintiffs. Yet, as noted hereinafter, it is clearly established on this record that the project owners are entitled to the rent increases in full. They are behind in their mortgage payments, and their mortgage may be foreclosed because of their default. Inflation and drastic cost increases, which have been recognized by HUD, entitle the project owners to the rent increases which have now been put into effect but restrained by this Court. For these reasons, the Court agreed to have this immediate hearing and to rule at once on the pending motions.

Several preliminary matters can be dealt with summarily. I am satisfied that this Court has jurisdiction under 28 U.S.C. § 1361 and/or under 28 U.S.C. § 1337. *Brown* v. *Weinberger*, 382 F.Supp. 1092, 1095-97 (D.Md.1974); *Bloodworth* v. *Oxford Village Townhouses, Inc.*, 377 F.Supp. 709, 714-15 (N.D. Ga.1974).

I am further satisfied that the plaintiffs have standing to bring this action as the challenged action has or will cause them injury in fact, and they are within the zone of interests to be protected by the statute in question. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 90 S.Ct. 327, 25 L.Ed.2d 184 (1970). Plaintiffs are clearly the ultimate beneficiaries of the operating subsidies available under Section 212 of the 1974

Housing Act, as their rents are reduced if the subsidies are paid.

Next, I find (and plaintiffs and the private defendants have agreed) that this is a proper class action. The class consists of those tenants at Uplands whose incomes do not exceed 80 per cent of the median income for the Baltimore area and whose rents, under the increases approved as of May 1, 1975, exceeded 30 per cent of their adjusted gross incomes. It is the rents paid by these tenants which are eligible for an operating subsidy under Section 212 of the 1974 Housing Act. The private defendants have determined, and plaintiffs have agreed, that 424 of the 989 tenants at Uplands are members of the class of persons whom plaintiffs represent. I am satisfied, on the record here, that all the requirements of Rule 23, F.R.Civ.P., have been met, and therefore that this is a proper class action.

With respect to the merits, I find first that there is no merit to plaintiffs' contention that this Court should enjoin the collection of all of the rent increase, effective May 1, 1975. The affidavits and other undisputed facts show that the increased rentals were justified by the landlord's increased costs of operation. And the undisputed facts further show that the increased costs used as a basis for the landlord's application to HUD seeking approval of increases in rent were reasonable costs and were justified by present economic conditions. The application for the increases was properly submitted to HUD, and HUD's approval of the increase was entirely justified.

Plaintiffs further argue that the rent increases should be rescinded because HUD was required by law to consider whether or not to pay operating subsidies under Subsections (f)(3) and (g) of Section 236 before approving any such increases. There is no statutory support for such a contention. Nowhere does it appear in the Act that approval of a rent increase must await a determination whether the project qualifies for an operating subsidy. Under Subsections (f)(3) and (g), HUD should act within a reasonable time after a request for a subsidy is made, but not necessarily before an increase is approved.

We thus come to the real essence of the controversy here. The central issue presented is solely one of statutory construction. The statutory provisions in question are as follows:

Section 236(f)(3):

> For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rent-

als of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

Section 236(g):

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsec-

> tion and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

The facts here are not in dispute. The question is: what duty does HUD have under these statutory provisions to pay operating subsidies to the Uplands project owners, under the undisputed facts? Some background discussion is necessary at this point.

The Housing Act of 1949, 42 U.S.C. § 1441 *et seq.*, which is the foundation for subsequent housing legislation, mandated "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family," and provided that HUD "shall exercise [its] powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established."

Despite this legislation and subsequent efforts at implementing new housing programs, national housing objectives were not attained. In 1968, Congress responded by enacting the Housing and Urban Development Act, which, among other things, added Section 236 to the National Housing Act. Section 2 of the 1968 Housing Act reaffirmed the national goal of the 1949 Housing Act and noted that "this goal has not been fully realized for many of the Nation's lower

income families." In Section 2, Congress declared that "the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality."

The 1974 Housing Act was designed to deal with problems which had occurred in the administration of federal housing programs since the 1968 Housing Act. Section 212, and in particular the subsections at issue here, subsections (f)(3) and (g), were intended to give the Secretary authority to adjust the subsidies for Section 236 project owners in order to meet increased operating costs. Under the 1968 Housing Act, the Secretary lacked authority to make such adjustments, with the result that increased operating costs were passed along from time to time *in toto* to tenants as increased rental charges.

The concern of the Congress about the effect of increased costs and resulting increased rents in Section 236 projects and its intent in enacting Section 212 of the 1974 Housing Act are expressed in the Senate Report which accompanies the Senate version of the Act, which was the one finally enacted. The Report in part is as follows:

> The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments.

While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance, and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A) the amount by which the sum of the cost of utilities, maintenance and local property taxes exceeds the initial operating expense level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community.

Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate if the "excess" funds derived from project operations were made available for the making of the additional assist-

> ance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expense ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that the Secretary would establish the "initial" ratios as of a date not later than 180 days after enactment of the bill.

S.Rep. No. 93-693, 93rd Cong., 2nd Sess. (1974), *reported in* 3 U.S. Code, Cong. & Admin.News, pp. 4273, 4303-04 (1974).

It should be noted that the word "maintenance" was ultimately removed from the legislation which thus now relates only to the excess "cost of utilities and local property taxes." Quite clearly, the Congressional intent was not to cover all of any increase in rents, but only some of the increase. Indeed, the word "offset" is used in this Senate Report.

The very situation envisioned by Congress has occurred here. Increased operating costs at Uplands have resulted in increased rents, which the record shows are entirely justified. Yet the low income tenants affected are unable to pay all or a part of such increased rents and may now face eviction. It was precisely this problem which led Congress to pass the 1974 amendments and to direct the Secretary of HUD to set aside excess rentals collected to pay operating subsidies where the conditions of the

statute were met. Such subsidies inure, of course, to the benefit of the low income tenants.

But in the face of this Congressional intent, what has been HUD's approach? Simply put, HUD has adopted the position that it will not implement the program in any way. Claiming that it has been given broad discretion by Congress to make these payments, HUD has decided that it will exercise such discretion to make no payments at all to any projects at any time, whether worthy or not and whether the project might fully qualify under the Congressional standards or not.

The reasons for HUD's approach are quite frankly stated in the Secretary's Brief and are further stated in argument. HUD purely and simply disagrees with the Congressional policy. As stated in its Brief, at pages 31 and 32:

> HUD has determined that it is essential to formulate a broad policy which will address itself to the economic problems facing all multifamily projects assisted by HUD. * * *
>
> "The operating subsidy authorized by Section 236, however, is not addressed to the problems facing all multifamily projects assisted by HUD under the National Housing Act. These operating subsidies would benefit only Section 236 projects and, even then, would not be applicable to every Section 236 project. These operating subsidies thus will not have a significant effect upon the economic difficulties facing all multifamily projects assisted by HUD.

Of course, these subsidies benefit only Section 236 projects. Congress has flatly so provided. And of course the subsidies would not be applicable to every Section 236 project. Again, this was the clear Congressional intent spelled out in the legislation. Continuing from HUD's Brief:

> Accordingly, the Secretary has exercised the discretion vested in her and has determined that implementation of these operating subsidies will not attack the general problems facing all multifamily projects. * * * Instead, HUD is considering a number of alternative proposals which would yield solutions which are more comprehensive and more equitable.
>
> * * * * *
>
> While HUD is examining the potential effectiveness of the alternative approaches, it does not plan to implement the operating subsidies authorized by Section 236.

The position taken by HUD here is arbitrary and capricious and an abuse of discretion. As the Fourth Circuit said in *Campaign Clean Water, Inc.* v. *Train*, 489 F.2d 492, 498 (4th Cir. 1973), *vacated on other grounds*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1975):

> When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals, the executive tres-

passes beyond the range of its legal discretion and presents an issue of constitutional dimensions which is obviously open to judicial review.

It is not HUD's prerogative to disagree with Congressional policy and refuse to implement it. An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch. *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 443 F.2d 689, 695 (1971).

I find on the record here that the federal defendants acted contrary to the requirements of Section 236(f)(3) and (g) when they refused to even consider whether under the circumstances of this case the private defendants were entitled or not to receive operating subsidies and whether the plaintiffs were entitled to the benefit of such subsidies. I will therefore order the federal defendants to comply with the law.

Plaintiffs have argued that the operating subsidies should equal the entire amount of the increase in their rent. Clearly, there is no support in the statute for this position. The increase is confined solely to increases in the costs of utilities and in local property taxes. It is estimated that this figure is approximately 50 per cent of the entire increase. Thus, the tenants themselves will have to pay the other portion of the rent increase. Congress undertook to alleviate

the burden placed on tenants, but did not go all the way and provide that the operating subsidy should account for all of any increase such as this one.

Fashioning the appropriate relief presents some difficulty in this case. Parts of the statute place mandatory duties on HUD, but other parts quite clearly require HUD to exercise its discretion. The statute requires HUD first to establish an initial operating expense level for each project. This was required to be done before February 18, 1975, and the language used was "shall". Although the duty is mandatory, HUD has arbitrarily refused to comply with this portion of the statute. No determinations at all have been made in this or any other case. Under this Court's powers of mandamus, the defendants will be ordered to make this determination for this project. I might note that the undisputed facts show that the project was, as of August 1973, fully occupied, but HUD should make the determination under the law.

Other duties imposed on the Secretary by the statute are indeed discretionary. But this does not mean that the Secretary may flatly refuse to exercise her discretion at all. She must, under the statute, consider whether this project qualifies for an operating subsidy under the enactment. This includes determining whether the increase in the cost of utilities and local property taxes is reasonable and comparable to cost increases affecting other rental projects in the community. Presumably, this increased cost is reasonable and comparable. HUD has already approved

a rent increase for this project based in part on these increased costs, and it would be surprising if HUD suddenly now found such increases to be unreasonable or not comparable to others in the community, or if it suddenly found that this project has not been tightly administered or has been poorly managed. Of course, management has little control over utility cost increases and increased taxes, and it is difficult to understand how such increases might be attributable to poor management. If this project and these increases satisfy these requirements and if there is no other valid reason why this project should not receive the operating subsidy, HUD should pay it, provided that HUD finds that the balance in the reserve funds is sufficient. The record here shows $31 million presently in the reserve fund. It simply is not a valid reason for HUD to say that it does not approve of the Congressional policy and does not intend to pay these subsidies to anyone, or that it would like to allocate this amount for payment elsewhere. In exercising its discretion, HUD should set forth reasons for the conclusion it reaches. The Court and the parties will then be able to determine whether such discretion has been properly exercised.

One further point should be considered. The federal defendants argue that the Secretary has no available contract authority to make these payments and that Congress must first release contract authority, specifically approving payments for each operating subsidy. This Court would disagree. Congress allowed the Secretary to release her own contract au-

thority for operating subsidies of this sort by allowing the Secretary to add the special reserve fund here to appropriations previously authorized.

I do not find that it was the intent of Congress in enacting Section 212 of the 1974 Housing Act to require that the Secretary would have to come back to Congress for contract authority each time it wished to expend these reserve funds. Congress directed in Subsection (g) that the excess reserve fund "shall be available" for the purpose of making these payments. This Court has previously found that the Congressional intention was that the funds set aside in this special reserve should be expended, if the Secretary makes the findings required in Subsection (f)(3). Certainly, it would make little sense (and indeed would render the program inoperative as a practical matter) if as to each project the Secretary would have to come back to Congress to secure contract authority to expend the necessary sums. The Secretary's argument as to a lack of contract authority here is no more than another aspect of the argument previously rejected that she has complete discretion to refuse to implement Congressional policy. This was a special reserve fund, created by excess rental charges, and not included in any Congressional appropriation. Thus, it is not subject to restrictions applicable to other appropriations under Section 236. Furthermore, I do not find that the Secretary had discretion to allocate this reserve fund for some purpose other than the payment of operating subsidies as provided in Subsections (f)(3) and (g).

What this Court will do is grant the preliminary injunction as to the federal defendants and retain jurisdiction of the case until the necessary determinations have been made by HUD. If the operating subsidies are approved, then that will end the case. If disapproved, plaintiffs will be entitled to consider the reasons for such disapproval and then apply to the Court for further relief if plaintiffs conclude that the Secretary has abused her discretion. Meanwhile, the Secretary will be ordered to pay the operating subsidy to the private defendants, commencing as of May 1, 1975. And the plaintiffs should pay, as of May 1, 1975, the portion of the increase not covered by increased utility or property tax costs.

The requirements for the entry of a preliminary injunction were set forth by the Fourth Circuit in *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F.2d 232, 235 (4th Cir. 1971), as follows:

> [I]t is sufficient if the court is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant. * * *

Other Fourth Circuit cases have indicated the the inquiry must also determine whether plaintiff will suffer irreparable injury if the injunction does not issue. *Long* v. *Robinson*, 432 F.2d 977 (4th Cir. 1970).

All of these requirements have been met here. I find that the plaintiffs will probably succeed in this case to the extent covered by the statute because the facts in the record indicate that this project probably will satisfy the requirements for a subsidy. If these payments are not ordered to be made at this time, plaintiffs may suffer irreparable harm. In balancing the equities, I would note that the effect of not entering a preliminary injunction would be considerable as far as the plaintiffs are concerned and as far as the private defendants are concerned, but that HUD would suffer very little if required to pay this operating subsidy from the $31 million available, during the pendency of this litigation. There are excess rentals now in existence in HUD's hands from which these payments can be made, and Congress has mandated that payments should be made if HUD determines that the statutory prerequisites have been met.

Finally, some of the cases say that the Court should consider the public interest in deciding whether or not to grant a preliminary injunction. There are two aspects of such a consideration here. First, it is of the utmost interest to the public that administrative bodies obey the law. Secondly, it is in the public interest that these low income tenants receive the help that Congress has directed they should receive, if, as it appears, they qualify for it.

I would suggest that counsel meet and prepare an Order which will grant the preliminary injunction. The Order should designate the class, it should include a brief statement as to a declaratory decree or

finding of the Court, and it should require the plaintiffs to pay the part of the rent that they have to pay. The Order should require the federal defendants to pay the subsidy as required by law and should direct the federal defendants to make determinations as promptly as possible under the statute. Finally, the Order should also provide that the Court would retain jurisdiction for any further proceedings necessary.

## APPENDIX D

## UNITED STATES DISTRICT COURT
## D. MARYLAND

Civ. No. H-75-506

BARBARA ROSS ET AL., PLAINTIFFS, Individually and as representatives of a class

*v.*

COMMUNITY SERVICES, INC., ET AL., DEFENDANT

Dec. 31, 1975

ALEXANDER HARVEY, II, District Judge:

In *Ross* v. *Community Services, Inc.*, 396 F.Supp. 278 (D.Md.1975), this Court ruled that plaintiffs, who are tenants at a federally-assisted housing project, were entitled to a preliminary injunction during the pendency of this case. Reference is made to that Opinion for a full discussion of the background of this litigation and of the questions presented. In its Order entered herein on May 19, 1975, this Court (1) certified a class of tenants to be represented by plaintiffs, (2) directed the federal defendants to make certain determinations required by Section 236 of the National Housing Act, and (3) required that the plaintiffs-tenants and defendant HUD should meanwhile each pay defendant Uplands, the landlord, one-

half of the rent increase which had become effective May 1, 1975.[1]

In compliance with that Order, the determinations in question have been made by the federal defendants, and affidavits reflecting such determinations have been filed herein. Presently before the Court are cross motions for summary judgment, together with supporting memoranda, filed by the plaintiffs and by the federal defendants.[2] Having agreed that the case is properly at issue for final determination, the parties have further agreed to the entry of an Interim Order[3] adjusting the payments to be made by the federal defendant to Uplands as an operating subsidy in accordance with the determinations made by HUD.

In its Opinion in the *Ross* case, this Court considered the Uplands rent increase of May 1, 1975 in the light of Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z-1, which was enacted on August 22, 1974 and which amended Section 236 of the National Housing Act. Plaintiffs' contention that they should not be required

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[1] The federal defendants filed a notice of appeal and a motion to stay the effect of that Order pending appeal. When the motion for a stay pending appeal was denied by this Court, the federal defendants dismissed their appeal pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure.

[2] The defendant Uplands has taken no position concerning the merits of the case.

[3] Such Order was filed on September 24, 1975.

to pay any part of such rent increase was rejected, this Court having found that the increased rentals in question were justified by the landlord's increased costs of operation and that the application for the increases had properly been approved by HUD.[4] 396 F.Supp. at 282-83. This Court then discussed in detail the applicability to this case of amendments to Section 236(f) and (g) of the National Housing Act, which authorized the Secretary of the Department of Housing and Urban Development to make certain assistance payments or operating subsidies to Section 236 project owners in order to cover a part of rent increases resulting from increased utility costs and property taxes exceeding a project's operating expense level.

In opposing plaintiffs' motion for a preliminary injunction, the federal defendants took the position that HUD had the discretion, under Subsections (f)(3) and (g) of Section 236, to refuse to make any operating subsidy payments to any project owner, including the defendant Uplands. This Court disagreed. 396 F.Supp. at 285-87. In entering a preliminary injunction, this Court ordered the Secretary to establish an initial operating expense level for the Uplands project and then to determine whether this project qualified for an operating subsidy under the statute. If the project and the rent increases in question were found to satisfy the requirements of the

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[4] In now moving for summary judgment, plaintiffs have not challenged that ruling.

law and if there were no other valid reason why this project should not receive the operating subsidy, this Court indicated that HUD should pay it, provided that the balance in the reserve fund set aside for such payments was sufficient to make the payment in question. 396 F.Supp. at 287.

As required by this Court, various determinations have now been made by HUD officials and have been made a part of the record in this case. Affidavits have been filed establishing an initial operating expense level for the Uplands apartment complex, as required by Section 236(f)(3).[5] Neither the plaintiffs nor the private defendants have questioned the correctness of the calculations that have now been made by HUD. The amount of the monthly operating subsidy payable to the private defendants under Section 236 has thus been agreed upon by all parties and has in fact been incorporated in the Interim Order which is to control payments to Uplands until a final decision has been made concerning the merits of this case.[6]

In moving for summary judgment, the federal defendants make essentially the same contentions previously rejected by this Court in the *Ross* opinion.[7]

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[5] The affidavits were submitted by Fred W. Pfaender, Director of HUD's Office of Loan Management.

[6] The Interim Order of September 24, 1975 did modify HUD's proposals slightly so as to permit a more equitable distribution of the operating subsidy among the tenants.

[7] The federal defendants have not challenged this Court's rulings that jurisdiction exists under 28 U.S.C. § 1361 and/

These defendants do not claim that any reason exists why the Uplands apartment complex would not qualify for assistance payments under Subsections (f)(3) and (g) of Section 236. Indeed, HUD has previously approved the rent increase of May 1, 1975. The undisputed facts show that increases in the cost of utilities and real property taxes which have caused most of the increase in the rents now charged by Uplands to the plaintiffs are reasonable. No contention has been made by HUD that the increased costs are not comparable to increases affecting other rental projects in the community. In spite of these facts indicating that the Uplands project is eligible for the subsidy payments in question, the federal defendants have taken the position, as they did earlier, that Congress, in amending Section 236 in 1974, gave HUD absolute discretion to decline to make any subsidy payments to any project, whether it would qualify for such payments or not. For the reasons previously stated in *Ross* v. *Community Services, Inc.*, *supra*, this Court concludes that there is no merit in the position taken by the federal defendants. Accordingly, plaintiffs' motion for summary judgment will be granted and the federal defendants' motion for summary judgment will be denied.

In *Ross*, this Court first discussed national housing policy as reflected in the Housing Act of 1949 and the Housing and Urban Development Act of

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or under 28 U.S.C. § 1337 and that plaintiffs have standing to bring this action. *See* 396 F.Supp. at 282.

1968 and then examined the legislative history which led to the enactment of Section 212 of the 1974 Housing Act. The conclusion was reached that Congress never intended to give HUD the discretion to decide as a matter of policy that no subsidy payments would be made to any project, whether it qualified under the statute or not. When the conclusions and findings in *Ross* are reviewed in the light of federal defendants' pending motion for summary judgment and supporting brief, this Court concludes that its earlier determinations are sound and require that plaintiffs be granted final relief in this case.

The federal defendants' reading of the statute miscomprehends the discretion conferred on HUD by Congress in amending Section 236(f) and (g). These defendants argue that Congress vested absolute discretion in the Secretary with respect to operating subsidies. Undoubtedly, the Secretary under Section 236(f)(3) has the discretion to determine whether a particular increase in the cost of utilities or real estate taxes is reasonable and is comparable to cost increases affecting other rental projects in the community. But Congress hardly intended to give the Secretary blanket discretion to frustrate Congressional policy and in effect adopt a different policy which the Secretary might believe would result in more comprehensive and more equitable results. Congress would hardly have included in this legislation provisions requiring the Secretary to establish an initial operating expense level for a project and requiring the Secretary to thereafter determine whether

such project qualified for the subsidy if, after those determinations had been made, the Secretary was empowered to decide that it would not in any event make the payments to a qualified recipient.

As this Court said in *Ross, supra* at page 286:

> It is not HUD's prerogative to disagree with Congressional policy and refuse to implement it. An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with requirements set up by the legislative branch. *National Automatic Laundry & Cleaning Council* v. *Shultz*, 143 U.S.App.D.C. 274, 443 F.2d 689, 695 (1971).

On the record here, this Court finds that HUD has abused the discretion conferred upon it under Section 236(f)(3) and (g) in declining to make the subsidy payments requested to Uplands on behalf of the plaintiffs. The facts show that this project qualifies for the payments in question and that the balance in the reserve funds is sufficient for the payments in question. No reason has been advanced by HUD in support of its decision other than its disagreement with the policy behind the legislation.

It is further argued that this Court's construction of Section 236 does not give proper deference or weight to the administrative interpretation which HUD has given the statute. *See Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 192, 13 L.Ed.2d 616 (1965).

The federal defendants also contend that Congress has approved HUD's interpretation of Section 236 by failing to take corrective action after having been informed of the Secretary's intent not to implement the opertaing subsidy program.

But the statute in question is a very recent enactment. Congress passed the 1974 Housing Act on August 22, 1974, and this suit was filed some eight months later. Such an interval is hardly sufficient to show a long-standing administrative interpretation which might tend to establish the validity of a particular construction. In any event, a court should accord no weight to an agency interpretation that is not "consistent with the congressional purpose," *Morton* v. *Ruiz*, 415 U.S. 199, 237, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), or where there are " 'compelling indications that it is wrong.' " *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95, 94 S.Ct. 334, 339, 38 L.Ed.2d 287 (1973). As discussed more fully in the *Ross* opinion, the clearly expressed Congressional purpose was to establish a program designed to provide assistance to low income tenants who were required to pay increased rents justifiably resulting from a landlord's increased costs. HUD was empowered to administer the program but was not authorized to refuse to implement the program in any way. There are compelling indications in this case that HUD's interpretation of the statute is wrong.

Nor would the failure of Congress to act in the brief period since these amendments became law sug-

gest that Congress has concurred in the administrative interpretation which HUD has accorded this statute. As the Court observed in *Pennsylvania* v. *Lynn*, 163 U.S.App.D.C. 288, 501 F.2d 848, 861 (1974), Congress "cannot be put to the necessity of acting twice before it is taken to mean what it said in duly enacted legislation."

The federal defendants have also renewed the argument rejected in *Ross* that the Secretary has no available contract authority to make the subsidy payments in question. *See* 396 F.Supp. at 287. The affidavit relied upon, that of Mr. Alfred J. Kliman, Director of HUD's Office of Budget, does not support such contention. As amended by the 1974 Housing Act, Section 236(g) specifically establishes "a reserve fund to be used by the Secretary to make additional assistance payments" under the operating subsidy program. Such fund "shall be available" for the purpose of making the payments in question. By the terms of this statute, Congress has provided the Secretary with the necessary contract authority for payment of operating subsidies. The reserve fund has been made unconditionally available for the payments in question. HUD seeks to avoid this result by arguing that the availability of the reserve fund established by Section 236(g) is restricted by the requirements of Section 236(i). Before 1974, use of the reserve fund was expressly made "subject to limits approved in appropriation Acts pursuant to subsection (i) of this section." *See* Section 236(g), 12 U.S.C.A. § 1715z-1(g) (1969 Ed.) But Section

212(3) of the 1974 Housing Act removed this restriction with respect to operating subsidies and made these sums immediately available for payment. The reserve fund, which is an accumulation of "all rental charges collected in excess of the basic rental charges" for a Section 236 project, presently shows a balance of approximately $31 million. This amount is presently on hand and available to the Secretary for the payment of operating subsidies, and no further release of contract authority by Congress is necessary for disbursement of portions of this fund to plaintiffs.

Finally, the federal defendants argue that the inadequacy of the present reserve fund supports the Secretary's decision not to implement the operating subsidy program. It is claimed that the $31 million reserve fund is not sufficient for the program because $51.4 million would be needed to cover the estimated costs of operating subsidies for all Section 236 projects which might qualify. The simple answer to this contention is that there is no indication that all Section 236 projects would qualify for an operating subsidy or have even applied for one. This Court has before it only the claims of the tenants at this one project. Speculation as to what might occur if other applications are filed at some time in the future would hardly furnish grounds for defeating the present rights of these plaintiffs. If, after implementation of the operating subsidy program, the approval of future applications would deplete the amount of the reserve fund, then, as the Supreme Court ob-

served in *Morton* v. *Ruiz*, *supra* 415 U.S. at 230, 94 S.Ct. at 1072 (1974), the Secretary may "create reasonable classifications and eligibility requirements in order to allocate the limited funds available to [her] for this purpose." However, the mere possibility that the reserve fund may prove insufficient at some time in the future is not justification for the Secretary's refusal to make any payments at all to Uplands at this time.

For the reasons stated, plaintiffs' motion for summary judgment is granted, and the federal defendants' motion for summary judgment is denied. Plaintiffs and their class are entitled to a permanent injunction requiring the federal defendants to make monthly subsidy payments to the defendant Uplands in the amounts previously agreed upon. Counsel are directed to confer and submit an appropriate Final Order.

## APPENDIX E

## STATUTORY PROVISIONS

12 U.S.C. 1715z-1 provides in pertinent part:

(a) *Authorization for periodic interest reduction payments on behalf of owner of rental housing projects.*

For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

(b) *Restrictions on payments; payments with respect to projects financed under State or local programs; mortgage insurance premium.*

Interest reduction payments with respect to a project shall only be made during such time as the project is operated as a rental housing project and is subject to a mortgage which meets the requirements of, and is insured under, subsection (j) of this section: *Provided*, That the Secretary is authorized to continue making such assistance payments where the mortgage has been assigned to the Secretary: *Provided, further*, That interest reduction payments may be made with respect to a mortgage or part thereof on a rental or cooperative housing project owned by a private nonprofit corporation or other pri-

vate nonprofit entity, a limited dividend corporation or other limited dividend entity, or a cooperative housing corporation, which is financed under a State or local program providing assistance through loans, loan insurance, or tax abatements, and which may involve either new or existing construction and which is approved for receiving the benefits of this section. The term "mortgage insurance premium", when used in this section in relation to a project financed by a loan under a State or local program, means such fees and charges, approved by the Secretary, as are payable by the mortgagor to the State or local agency mortgagee to meet reserve requirements and administrative expenses of such agency.

(c) *Amount of payments.*

The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

12 U.S.C. 1715z-1(f)(3) provides:

(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at

the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

12 U.S.C. 1715z-1(g) provides:

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph

(3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

42 U.S.C. 1441 provides:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. . . .

42 U.S.C. 1441a provides:

The Congress finds that the supply of the Nation's housing is not increasing rapidly enough to meet the national housing goal, established in the Housing Act of 1949, of the "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family". The Congress reaffirms this national housing goal and determines that it can be substantially achieved within the next decade by the construction or rehabilitation of twenty-six million housing units, six million of these for low and moderate income families.

P.L. 94-378 provides in pertinent part:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * * * *

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for

payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), $2,975,000,000; *Provided*, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 229780 69

Supreme Court, U. S.
FILED
AUG 19 1977
MICHAEL RODAK, JR., CLERK

# JOINT APPENDIX

## In the Supreme Court of the United States

OCTOBER TERM, 1977

**Nos. 76-1234 & 76-1261**

---

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

*Petitioners*

—*v.*—

BARBARA ROSS, ET AL.

and

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

*Petitioners*

—*v.*—

HILDA ABRAMS, ET AL.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

---

PETITIONS FOR WRITS OF CERTIORARI FILED ON MARCH 4, 1977 AND MARCH 11, 1977

PETITIONS GRANTED, MARCH 23, 1977

# In the Supreme Court of the United States

OCTOBER TERM, 1977

**Nos. 76-1234 & 76-1261**

---

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

*Petitioners*

—*v.*—

BARBARA ROSS, ET AL.

and

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

*Petitioners*

—*v.*—

HILDA ABRAMS, ET AL.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

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## RELEVANT DOCKET ENTRIES

### H 75-506

BARBARA ROSS, ET AL.

*v.*

COMMUNITY SERVICES, INC., ET AL.

| DATE | PROCEEDINGS |
|---|---|
| 1975 | |
| April 22 | (1) Complaint and Exhibit A. |
| April 22 | (2) Motion for Preliminary Injunction, Affidavits (9) and Memorandum in support thereof. |
| April 23 | (3) Summons issued as to Defendants, COMMUNITY SERVICES, INC., UPLANDS ASSOCIATES A. etc., UPLANDS ASSOCIATES B, etc., and MORTON SARUBIN, etc. (Each served) 4/30/75) |
| April 23 | (4) Summons issued as to Defendants, CARLA A. HILLS, etc., H.R. CRAWFORD, etc., and EVERETT H. ROTSCHILD, etc. (Each served—see Marshall's returns) |
| April 28 | (5) Motion of plaintiffs for a temporary restraining order, and affidavits of Barbara Ross, Ella Sparks, Kathleen Armes, Bernice Johnson, Beverly Stewart, Cynthia Jackson, Doris Johnson, Barbara Campbell, and Carol Stover attached thereto, and memorandum in support thereof. (2 c/s) |
| April 28 | (6) Affidavit of Morton T. Sarubin in support of opposition of defendants to motion of plaintiff for temporary restraining order, and attachment. |
| April 28 | — Conference in chambers, re: temporary restraining order before Young, J. |

| DATE | PROCEEDINGS |
|---|---|

1975

April 28 (7) Temporary Restraining Order (Young, J.) that defendants are restrained until May 8, 1975 at 4:30 p.m. from taking summary ejectment action against plaintiffs as therein more particularly set forth.

April 30 — Status conference held before Harvey, J.

May 6 (8) Motion of plaintiffs for summary judgment, and memorandum in support thereof. (2 c/s)

May 6 (9) Motion of plaintiffs for authorization to maintain suit as a class action, and memorandum of points and authorities in support thereof. (2 c/s)

May 8 (10) Temporary Restraining Order (Harvey, J.) that defendants are restrained until May 14, 1975 at 10:00 a.m. from taking summary ejectment action against plaintiffs as therein more particularly set forth. (Cy. sent)

May 8 (11) Proposed preliminary injunction submitted by plaintiffs.

May 9 (12) Supplemental memorandum of plaintiffs on legislative history. (2c/s)

May 9 (13) Memorandum of Non-Federal Defendants in support of oral request of non-federal defendants for prompt disposition of this case. (2 c/s)

May 9 (14) Supplemental affidavit of Morton T. Sarubin on behalf of non-federal defendants and exhibit A attached thereto. (2c/s)

May 9 (15) Motion of non-federal defendants for consolidation of trial on the merits with application for preliminary injunction, and proposed order. (2 c/s)

May 12 (16) Motion of federal defendants for summary judgment, affidavit of H.R. Crawford in support thereof, affidavit of Albert J. Kliman in support thereof, affidavit of Jack A. Meyer in support thereof and memorandum brief in support thereof. (2 c/s)

| DATE | PROCEEDINGS |
|---|---|

1975

May 16 —— Hearing on all pending motions before Harvey, J.

May 16 (17) Second supplemental affidavit of Morton T. Sarubin submitted on behalf of non-federal defendants in opposition to motion of plaintiffs for preliminary injunction, and exhibit attached thereto.

May 16 —— Oral opinion rendered by the Court.

May 19 (18) Opposition of federal defendants to proposed order. (2c/s)

May 19 (19) Order (Harvey, J.) that the class herein is certified, that the federal defendants shall make certain determinations as therein more particularly set forth, that the class members shall make certain payments as therein set forth, and that this Court will retain jurisdiction over the parties herein, and exhibits attached thereto. (Cy.Sent)

May 22 (20) Transcript of Proceedings before the Court (Harvey, J.) (Oral Opinion) dated May 16, 1975.

May 23 (21) Notice of Appeal of Federal Defendants, Carla A. Hills, H. R. Crawford and Everett H. Rothschild. (copies mailed by Clerk—5-27-75)

May 23 (22) Motion of Federal Defendants for a Stay Pending Appeal, or in the alternative, for a stay of 15 days, Memorandum Brief in support thereof, affidavit of H. R. Crawford in support thereof, and proposed Order. (2 c/s)

May 27 (23) Order (Harvey, J.) that the motion for a stay pending appeal filed by the federal defendants is "DENIED", and that the federal defendants should make the required payments to the private defendants within ten (10) days within the date of this Order. (Cys. sent)

| DATE | PROCEEDINGS |
|---|---|

1975

June 19 (24) Motion of Federal Defendants to dismiss appeal filed by said Defendants and Order (Harvey, J.) as prayed and Notice. (cys. mailed 6/24/75—BB)

June 25 (25) Interrogatories of plaintiffs propounded to federal defendants and Exhibit A attached thereto.

June 26 (26) ANSWER of federal defendants to the complaint.

June 26 (27) Memorandum and Order (Harvey, J.) dated May 16, 1975.

June 30 (28) Motion of Plaintiffs to cite for contempt, memorandum of points and authorities in support thereof, and Order (Harvey, J.) directing federal defendants to show cause on or before July 30, 1975 as therein more particularly set forth. (Cys. delivered to U.S. Marshal 6/30/75) (See returns of USM)

July 2 (29) Notice of federal defendants of actions taken to comply with the Court's order of May 19, 1975, and affidavit of Fred W. Pfaender in support thereof. (2 c/s)

July 14 (30) Notice of federal defendants of actions taken to comply with the Court's order of May 19, 1975, and affidavit of Fred W. Pfaender in support thereof. (2 c/s)

July 21 (31) Motion of plaintiffs for leave to withdraw motion of plaintiffs to site Federal defendants for contempt, and order (Harvey, J.) granting leave to withdraw said motion as prayed. (cys. sent)

July 29 (32) Response of Federal defendants to interrogatories propounded by plaintiff. (c/s)

| DATE | PROCEEDINGS |
|---|---|

1975

Aug. 1 (33) Motion of federal defendants for summary judgment, and memorandum brief in support thereof, and request for modified order. (2 c/s).

Aug. 4 (34) Motion of plaintiffs to compel answers to interrogatories propounded to federal defendants, exhibit A attached thereto, copy of affidavit of Robert P. Kalish, points and authorities in support thereof, and request for hearing. (2 c/s)

Aug. 11 (35) Reply memorandum of plaintiffs in opposition to motion of defendants for summary judgment. (2 c/s)

Aug. 19 (36) Motion of federal defendants for protective order. (2 c/s).

Aug. 19 (37) Motion of federal defendants to expedite consideration of case upon merits. (2 c/s).

Aug. 19 (38) Memorandum of federal defendants in support of their motion for protective order and their motion to expedite consideration of case upon merits and their opposition to the motion of plaintiffs to compel answers to interrogatories. (2/c/s.)

Aug. 25 (39) Memorandum of federal defendants in further support of their motion for summary judgment and in opposition to motion of plaintiffs for summary judgment. (2 c/s).

Aug. 28 (40) ANSWER, request for modified order, and memorandum in support thereof, of non-federal defendants to motion for summary judgment and request for modified order of federal defendants. (1 c/s).

Sept. 12 —— Status conference held before Harvey, J.

| DATE | PROCEEDINGS |
|---|---|

1975

Sept. 24 (41) Interim Order (Harvey, J.) "REFLECTING" certain additional matters, as therein more particularly set forth, pending the Court's determination on summary judgment. (ccs mailed counsel 9/24/75).

Sept. 24 (42) Motion and Order (Harvey, J.) "GRANTING" leave to withdraw interrogatories of plaintiffs propounded to federal defendants and the motion of plaintiffs to compel answers to interrogatories propounded to federal defendants. (ccs sent counsel 9/24/75).

Dec. 31 (43) OPINION (Harvey, J.) (1) "GRANTING" motion of plaintiffs for summary judgment; (2) "DENYING" motion of federal defendants for summary judgment; (3) "FINDING" plaintiffs and their class are entitled to a permanent injunction requiring federal defendants to make monthly subsidy payments to the Defendant Uplands in the amounts previously agreed upon; and (4) "DIRECTING" counsel to confer and submit an appropriate Final Order to the Court. (ccs mailed counsel).

1976

Jan. 26 (44) Consent Order (Harvey, J.) "ADJUDGING AND DECREEING" (1) motion of plaintiffs and their class for summary judgment be and is hereby "GRANTED"; (2) cross-motion of federal defendants for summary judgment be and is hereby "DENIED"; and (3) that permanent injunction be and is hereby "GRANTED" to the Defendants, Uplands Associates A and Uplands Associates B against the federal defendants and the federal defendants are required to make monthly subsidy payments to the Defendants, Uplands Associates A and Uplands Associates B, in the sum of $9,166.88. (c/s mailed counsel).

| DATE | PROCEEDINGS |
|---|---|
| 1976 | |
| Jan 29 | (45) Motion of federal defendants to reconsider and alter or amend the judgment or in the alternative for a stay pending appeal or determination whether appeal would be taken with a copy of an affidavit of Carla A. Hills, Secretary of Department of Housing and Urban Development, with brief in support thereto. (2 c/s) |
| Feb. 9 | (46) Notice of federal defendants to appeal to Supreme Court if motion of defendant to reconsider and alter or amend or in the alternative for a stay pending appeal is denied by this Court, affidavits of Thomas J. O'Connor, Robert C. Odle, Jr., and Exhibits A through C in support thereto. (2 c/s) |
| Feb. 13 | (47) Answer of plaintiffs in opposition to motion of federal defendants to reconsider and for a stay pending appeal. (3 c/s) |
| Feb. 20 | (48) Answer of private defendants in opposition to motion of federal defendants to reconsider and for a stay pending appeal. (2 c/s). |
| Feb. 24 | (49) Memorandum and Order (Harvey, J.) "DENYING" motion of federal defendants, to reconsider and alter or amend this Court's final order of January 26, 1976 and "DENYING" motion of federal defendant for a stay of such order pending appeal. (c/s mailed to counsel 2/24/76). |
| March 4 | (50) Notice of Appeal of Federal Defendants Carla A. Hills, H. R. Crawford and Everette H. Rothschild. (C/M 3/8/76). |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.: H 75-506

[Filed: 22nd of April, 1975]

BARBARA ROSS,
402 Athol Avenue, Apt. B,
Baltimore City, Maryland

and

ELLA SPARKS,
408 Swann Avenue, Apt. A,
Baltimore City, Maryland

and

KATHLEEN M. ARMES,
4261 Old Frederick Road, Apt. A,
Baltimore City, Maryland

and

BERNICE JOHNSON,
510 Glen Allen Drive, Apt. E,
Baltimore City, Maryland

and

BEVERLY STEWART
4609 Manordene Road, Apt. B,
Baltimore, Maryland

and

CYNTHIA JACKSON,
408 Athol Avenue, Apt. B,
Baltimore City, Maryland

and

DORIS JOHNSON,
4653 Manordene Road, Apt. B,
Baltimore, Maryland

and

BARBARA CAMPBELL,
500 Glen Allen Drive, Apt. F,
Baltimore City, Maryland

and

CAROL STOVER,
410 Athol Avenue, Apt. D,
Baltimore City, Maryland

PLAINTIFFS, INDIVIDUALLY, AND AS REPRESENTATIVES OF A CLASS

*vs.*

COMMUNITY SERVICES, INC.
4605 Edmondson Avenue
Baltimore, Maryland 21229

SERVE:

JULIA PATERSON, Resident Agent
6-8 East Read Street
Baltimore, Maryland 21202

UPLANDS ASSOCIATES A, a Maryland
Limited Partnership
6-8 East Read Street
Baltimore, Maryland 21202

UPLANDS ASSOCIATES B, a Maryland
Limited Partnership
6-8 East Read Street
Baltimore, Maryland 21202

MORTON SARUBIN, Individually
and doing business as
Uplands Associates

and

CARLA A. HILLS, Individually and in her capacity as
Secretary of the Department of Housing and Urban
Development
451 Seventh Street, S.W.
Washington, D.C. 20410

and

H. R. CRAWFORD, Individually and in his capacity as Assistant Secretary for Housing Management of the Department of Housing and Community Development
451 Seventh Street, S.W.
Washington, D.C. 20410

and

EVERETT H. ROTHSCHILD, Individually and in his capacity as Acting Director of the Baltimore Area Office, Department of Housing and Urban Development
Mercantile Bank & Trust Building
Baltimore, Maryland 21202

DEFENDANTS

## COMPLAINT

## FOR DECLARATORY AND INJUNCTIVE RELIEF

### I.

### Preliminary Statement and Factual Background

1. The plaintiffs, individually and on behalf of all others similarly situated, seek declaratory and injunctive relief to compel rescission of the Department of Housing and Urban Development's (HUD) approval of a 18% rental increase effective May 1, 1975, or in the alternative, to compel the defendants, Uplands Associates A & B et al, to apply for and the defendants, HUD, et al to implement the operating subsidy provision for Section 236 projects required by Section 212 of the Housing and Community Development Act of 1974; and until such application is acted upon, plaintiffs seek to enjoin the defendants, Uplands Associates A & B, et al, from collecting rents from the plaintiffs in excess of twenty-five percent (25%) of their income.

On December 27, 1974 the Supplemental Appropriations Act[1] was signed into law. This act provided the necessary appropriations to effectuate the operating subsidy provision.

[1] Pub.L. 93-414, 93rd Cong., H.R. 15572 (Sept. 6, 1974).

2. A previous suit involving essentially the same parties hereto was filed in this Court on January 13, 1975 (Civil Action No.: H-75-34). Although the plaintiffs in that case challenged the legality of a 5% rental increase for the Uplands Apartment Complex, effective January 1, 1975, the issues there were necessarily different from the issues raised herein. In that case plaintiffs based their suit on the defendants' failure to accord them either an administrative or due process hearing prior to the rental increase, in violation of HUD Regulation 24 C.F.R. 401 et seq., and the Fifth Amendment of the United States Constitution. Plaintiffs make no such contention with respect to the overall 18% rental increase,[2] effective May 1, 1975. The issue raised in the present suit to wit, HUD's obligation to pay to Uplands Associates, the Section 236 project owner, an operating subsidy sufficient to pay the increase in utility costs and property taxes above the initial operating expense level, thereby obviating the need for a rental increase, did not ripen into controversy until February 18, 1975,[3] the date on which the defendant Secretary was required by law (Section 212(g) of the Housing and Community Development Act of 1974), to establish the initial operating expense level as a prerequisite to payment of the operating subsidy.

3. Individually named plaintiffs in this action and the class which they represent are tenants of Uplands Apartments in Baltimore City, Maryland. Their individual incomes do not exceed 80% of the median income for the Baltimore SMSA, and the rental increase, effective May 1, 1975, will cause them to be paying more than 30% of their income for rent. The Uplands project is clearly eligible for the operating subsidy under Section 212(f)(3) and (g) of the Housing and Community Development Act of 1974.

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[2] The 18% rent increase represents the increase over the rent charged prior to 1/1/75; many tenants have not paid the 5% rent increase, effective 1/1/75.

[3] Section 212(g) (12 U.S.C. Section 1715 z-1(g)) provides specifically that the Secretary shall establish the initial operating expense level for any project not later than 180 days after August 22, 1974.

4. The apartments are owned by the defendants, Upland Associates A & B and Morton Sarubin, and managed by the Defendant, Community Services, Inc. The apartments were financed under mortgages insured by the Federal Housing Authority pursuant to section 236 of the National Housing Act, 12 U.S.C. Sec. 1715 z-1 and continue to receive subsidies under the Act.

5. The computations by HUD for the rental increase were based on the increased costs for utilities, property taxes, and "other justified operational costs." Plaintiffs, upon information and belief, aver that the defendants, Uplands Associates A & B, are eligible to receive from HUD funds for the entire amount of the increase in operating costs above the initial operating expense level.

6. In addition, HUD is required by Section 212(g) of the 1974 Housing and Community Development Act to establish a reserve fund from all rentals collected in excess of basic rental charges and to use this fund primarily as operating subsidies for Section 236 projects.

7. Unless the defendants are enjoined from imposing the rental increase, effective May 1, 1975, or in the alternative, unless the defendant, HUD, is compelled to pay Uplands an operating subsidy sufficient to off-set the increased costs above the initial operating expense level, thereby making unnecessary the rental increase, the plaintiffs will be unable to pay the rental increase, will be evicted, and will consequently be caused to suffer irreparable loss and injury because there is no adequate low cost housing for them in or around Baltimore City.

## II.

### Jurisdiction

8. This action arises under the National Housing Act, 12 U.S.C. § 1701 *et seq.*, in particular, 12 U.S.C. § 1715z-1, as amended by Section 212 of the Housing and Community Development Act of 1974. Jurisdiction is conferred on this Court by the following statutes: 28 U.S.C. § 1361, mandamus against federal defendants; 28 U.S.C. § 1337, actions arising out of Congressional legislation relating to commerce; 5 U.S.C. § 702-704, the Adminis-

trative Procedures Act; and 28 U.S.C. § 1331, the amount in controversy exceeding ten thousand dollars ($10,000) for each plaintiff. Jurisdiction of this court over the private defendants is conferred by Rule 19(a) of the Federal Rules of Civil Procedure.[4] Declaratory relief is sought pursuant to 28 U.S.C. § 2201-2202.

## III.

### Plaintiffs

9. The Plaintiff, Barbara Ross, age 37, has been and is now a tenant at the Uplands Apartments, residing with her four children in a three bedroom apartment, Apartment B, Athol Avenue in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $177 to $209 a month, beginning 5/1/75. She has a gross income of $4896 a year and the increased rent will constitute 51.4% of her gross income.

10. The Plaintiff, Ella Sparks, has been and is now a tenant at the Uplands Apartments, residing with her two children in a two bedroom (small) apartment at Apartment A, 408 Swann Avenue in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $141 to $166 a month, beginning 5/1/75. She has a gross income of $4224 a year and the increased rent will constitute 47% of her gross income.

11. The Plaintiff, Kathleen M. Armes, age 28, has been and is now a tenant at the Uplands Apartments, residing with her three children in a two bedroom apartment at Apartment A, 4261 Old Frederick Road in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $141 to $166 a month, beginning 5/1/75. She has a gross income of $2712 a year and the increased rent will constitute 73.5% of her gross income.

12. The Plaintiff, Bernice Johnson, age 45, has been and is now a tenant at the Uplands Apartments, residing with her adult daughter and the latter's child in a two

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[4] *Langevin* v. *Chenango Court, Inc.* (2d Cir., 1971), 447 F.2d 296, 300.

bedroom (small) apartment at Apartment E, 510 Glen Allen Drive in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $141 to $166 a month, beginning 5/1/75. She and her adult daughter together have a gross income of $3792 a year and the increased rent will constitute 52.5% of her gross income.

13. The Plaintiff, Beverly Stewart, has been and is now a tenant at the Uplands Apartments, residing with her two children in a two bedroom (medium) apartment at Apartment B, 4609 Manordene Road in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $144 to $170 a month, beginning 5/1/75. She has a gross income of $6379 a year and the increased rent will constitute 31.9% of her gross income.

14. The Plaintiff, Cynthia Jackson, has been and is now a tenant of the Uplands Apartments, residing with her two children in a three bedroom apartment at Apartment B, 408 Athol Avenue, in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $177 to $209 a month, beginning 5/1/75. She has a gross income of $2328 a year and the increased rent will constitute 108% of her gross income.

15. The Plaintiff, Doris Johnson, has been and is now a tenant at the Uplands Apartments, residing with her one child in a two bedroom (medium) apartment at Apartment E, 4653 Manordene Road in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $144 to $170 a month, beginning 5/1/75. She has a gross income of $5769 a year and the increased rent will constitute 35.4% of her gross income.

16. The Plaintiff Barbara Campbell, age 32, has been and is now a tenant at the Uplands Apartments, residing with her one child in a two bedroom (medium) apartment at Apartment F, 500 Glen Allen Drive in Baltimore City. She has received notice from the private Defendants that her rent will be increased from $151 to $170 a month, beginning 5/1/75. She has a gross income

of $1776 a year and the increased rent will constitute 115% of her gross income.

17. The Plaintiff, Carol Stover, has been and is now a tenant at the Uplands Apartments, residing in a one bedroom apartment at Apartment D, 410 Athol Avenue in Baltimore City. She has received notice that her rent will be increased from $123 to $145 a month, beginning 5/1/75. She has a gross income of $4800 a year and the increased rent will constitute 36% of her gross income.

## IV.

### Defendants

18. The defendants, Morton Sarubin, individually and doing business as Uplands Associates, Uplands Associates A, a Maryland limited partnership, Uplands Associates B, a Maryland limited partnership, are all owners of the Uplands Apartments project, a 989 unit apartment complex in Baltimore City, State of Maryland.

19. The defendant, Community Services, Inc., a Maryland Corporation, operates and manages the Uplands Apartments. It is the management agent of the Uplands Associates A, and Uplands Associates B.

20. Defendant Carla A. Hills is Secretary of the Department of Housing and Urban Development (HUD) of the United States of America. She has overall responsibility for the administration and enforcement of all laws, regulations, powers and duties pertaining to the operation of that agency. In particular, defendant Hills is responsible for the administration of the National Housing Act, 12 U.S.C. § 1701 *et seq.*

21. Defendant H. R. Crawford is the Assistant Secretary for Housing Management, Department of Housing and Urban Development. He is responsible for the management of housing projects constructed under the National Housing Act and built pursuant to HUD subsidy and/or loan guarantee programs and also under authority delegated to him by the Secretary. In particular, he is responsible for the administration and enforcement of the § 236 housing program.

22. Defendant Everett H. Rothschild is area acting director of the Baltimore HUD Area Office and in that capacity is responsible for administering and enforcing the § 236 program in Maryland and all laws, regulations and procedures applicable thereto.

## V.

### Class Action

23. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the named plaintiffs bring this action individually and on behalf of all others similarly situated. Plaintiffs' class is comprised of all persons having an income of 80% of the median income for the Baltimore SMSA, whose rent on 5/1/75 will exceed 30% of their gross incomes, who presently reside at the Uplands Apartments and who may reside there in the future. This class is so numerous that joinder of all members is impossible or impracticable. There are questions of law and fact common to the class. The named plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted on grounds generally applicable to the class, thereby making preliminary and final injunctive and declaratory relief appropriate with respect to the class as a whole.

## VI.

### Factual Allegations

24. Uplands Apartments is a low to moderate income housing project financed under Title 12 U.S.C. § 1715 z-1. Defendants Community Services, Inc., Uplands Associates A, Uplands Associates B and Morton Sarubin, own and operate this project pursuant to agreements signed between themselves and HUD acting through defendants Hills, Crawford and Rothschild. Uplands Apartments contain 989 rental units and are located in Baltimore City, Maryland.

25. The United States Department of Housing and Urban Development (HUD) and defendants Hills, Crawford and Rothschild in their official capacities are charged with the administrative supervision and direction of the

§ 236 program of low and moderate income interest subsidized housing, 12 U.S.C. § 1715 z-1. Pursuant to that authority, HUD has entered agreements and disbursed funds with the intent and purpose of providing housing pursuant to the program and of establishing local grantees of federal funds for the certification and construction of § 236 low and moderate income housing projects.

26. Congress enacted the National Housing Act in order to provide adequate housing to "families with incomes so low they could not otherwise decently house themselves." (12 U.S.C. § 1701t). The Section 236 program is designed to further this goal by providing federal financing to assist in the construction of "rental housing projects designed for occupancy by lower income families" (12 U.S.C. § 1715z-a). Section 236 authorized HUD to make periodic interest reduction payments to a mortgagee on behalf of a project owner in an amount not to exceed the sum necessary to reduce the effective interest rate payments on the mortgage for said owner to 1 per centum per annum. The savings realized by this subsidy is passed on to the tenants in the form of reduced rental payments pursuant to Section 236(f) (12 U.S.C. § 1715 z-1(f).

27. As a condition for receiving the benefits of the act, the project owner must operate the project in accordance with such requirements with respect to tenant eligibility, lease agreements and rents as HUD may prescribe. In approving rents and charges, HUD looks at the following and similar factors:

"(1) Rental income necessary to maintain the economic soundness of the project.

(2) Rental incomes necessary to provide a reasonable return on the investment consistent with providing reasonable rentals to tenants." 24 C.F.R. § 221.531(c).

28. As a condition for receiving the benefits of interest reduction payments, the project owner must operate the project in accordance with such requirements with respect to tenant eligibility, lease agreements and rents as HUD may prescribe. In addition, an owner adopts and HUD approves procedures for the periodic recertifi-

cation of the income of tenants in relation to the rent paid. In no case is an owner of such a project to charge a qualified tenant rent in excess of 25% of his income or the basic rental whichever is greater, 12 U.S.C. § 1715 z-1(f), 24 C.F.R.

29. The private defendant owners each have entered into a Regulatory Agreement with HUD pursuant to 28 U.S.C. § 1715z-1 and regulations promulgated thereunder. The Standard Regulatory Agreement (FHA Form 3136) provides in pertinent part:

> "4. The owners covenant and agree that:
>
> b. The rental charged for each unit which will include all utilities except telephone, will be equal to 25% of the tenant's income or the basic rental, whichever is greater, but in no event shall rental charged exceed the fair market rental.
>
> h. They shall require all tenants who do not pay the fair market to execute a lease in the form prescribed by the Commissioner, and shall not rent any unit in the project for less than 30 days nor more than one year;
>
> i. No change shall be made in the basic rental or fair market rental unless approved by the Commissioner.

30. Plaintiffs and members of their class are low income families within the meaning of Title 28 U.S.C. § 1715 z-1. As such, they rent units in Uplands Apartments from defendants Community Services, Inc., Uplands Associates A, Uplands Associates B, and Morton Sarubin at an amount less than the fair market value of their units.

31. More particularly, defendant owners acting through their management agent defendant, Community Services, Inc., (agent) approved plaintiffs on the basis of their income as eligible tenants and entered into lease agreements with them.

32. Under the terms of these lease agreements, plaintiffs are to pay rent at the rate less than the fair market value of units comparable to theirs on the open market. Based upon information and belief, the difference be-

tween the amount of rent plaintiffs pay and the fair market value of their units when spread over the life of the mortgage represents a value to each plaintiff exceeding ten thousand dollars ($10,000.00).

33. On or about March 28, 1975, defendants Community Services, Inc., Uplands Associates A, Uplands Associates B and Morton Sarubin, acting through their management agent, Community Services, Inc., notified plaintiffs that their rents would be increased 18%, effective May 1, 1975.

34. Neither the Defendant Secretary, Carla A. Hills nor the other public defendants, have established an initial operating expense level for the Uplands Section 236 project, as required by Section 212(f)(3) and (g) of the Housing and Community Development Act of 1974 [5] (12 U.S.C. § 1715 z-1(f)(3) and (g)) to have been done "not later than 180 days after 8/22/74" (to wit: 2/18/75).

35. Nor has the Defendant Secretary or the other public Defendants made "additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level", as required by Section 212(f)(3) of the HCDA 1974 (12 U.S.C. § 1715 z-1(f)(3)), which payments would have obviated the need for the rental increases unlawfully approved by said Defendants.

36. Nor has the Defendant Secretary or the other public Defendants allocated the rental charges, collected from the project owner in excess of the basic rental charges, back to the project owner as additional assistance payments to offset the increased cost of utilities and local property taxes, as required by Section 212(g) of the HCDA 1974 (12 U.S.C. § 1715 z-1(g)), which payments would also have obviated the need for the rental increase unlawfully approved by said Defendants.

37. Nor has the Defendant Secretary or the other public Defendants complied with the Appropriations Act for the Department of Housing and Urban Development [6]

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[5] HCDA 1974, PL 93-383, 93rd Cong. S. 3066, August 22, 1974.

[6] Pub. L. 93-414, 93rd Cong., H.R. 15572 (Sept. 6, 1974).

which states that funds for the administration of housing production and mortgage credit may not be used for the Section 23 (leased public housing program) or any replacement program (i.e. Section 8) "unless the available, unused balance of contract authority under the Section 236 program, or any replacement program, is made available for commitment concurrent with the making available for commitment of any contract authority under the Section 23 program, or any replacement program".

38. As a result of the private Defendants' failure to apply for the additional assistance payments specified in paragraphs 29 and 30, supra, and as a result of the public Defendants' failure to allocate said additional assistance payments to the project owner, the Plaintiffs and the members of their class have been and are being denied the very benefits which Congress provided in the Housing and Community Development Act of 1974 and the Appropriation Act thereto; that is, the Plaintiffs are being compelled to pay an 18% rent increase authorized by the public Defendants ostensibly because of the project owners' increased utility costs and property taxes,[7] when funds have been appropriated by Congress and made available to the Secretary for the very purpose of offsetting these costs and protecting the tenants against the consequent need for such rent increases.[8]

39. By reason of the public Defendants' arbitrary refusal to apply the aforementioned additional assistance payments to the private Defendants' increased operating costs and by reason of the private Defendants' failure to apply for these assistance payments, the Plaintiffs and their class are being subjected to an unlawful rent increase on 5/1/75 which they cannot afford to pay, and are consequently threatened with imminent eviction from their low cost apartment units, all of which actions are causing them to suffer immediate and irreparable loss and injury.

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[7] See letter from Eugene R. Henderson to Community Services, Inc. dated 3/28/75, attached hereto as Exhibit A and incorporated herein by reference.

[8] See S.R. No. 693 U.S. Cong. News—1974, Pp. 3809, 3810, 3881.

## VII.

### Cause of Action

40. The actions of the private Defendants in applying for, and the federal Defendants in approving rent increases without first utilizing the additional assistance payments provided specifically by Congress to offset the increased operating costs (which have purportedly given rise to the need for the rental increase) have deprived Plaintiffs of their rights under Section 212(f) and (3) and (g) of the Housing and Community Development Act of 1974 (12 U.S.C. § 1715 z-1(f)(3) and (g)).

41. Defendants' actions violated plaintiffs' rights under said act in that the act was intended to benefit plaintiffs and their class by providing decent housing to low income people. Plaintiffs are low income people within the meaning of the statute and defendants' actions adversely affect plaintiffs' ability either to remain in the project or if they remain require them to spend a higher amount of their disposable income on rents, a result inimical to the purpose and interest said statute seeks to protects.

## VIII.

### Relief

WHEREFORE, plaintiffs on behalf of themselves and the class they represent pray this Court to:

#### A. General

Enter its judgment assuming jurisdiction of this matter and declaring this to be a class action and further declaring plaintiffs to be appropriate representatives of the class.

#### B. Illegal Rent Increases

Enter judgment declaring the rent increases the private defendants put into effect and the federal defendants approved to be illegal and that said defendants have violated plaintiffs' rights under the National Housing and Community Development Act of 1974.

C.

Enter its order declaring that the federal Defendants owe a duty to Plaintiffs under Sections 212(f)(3) and (g) of the Housing and Community Development Act of 1974 to provide additional assistance payments to the private Defendants in sufficient sums to offset the true increase in operating costs above the initial operating expense level.

D.

Enter a preliminary injunction restraining the private Defendants and all their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from imposing and collecting a rent increase from the Plaintiffs and their class pending the final disposition of this case on the merits.

E.

Enter a preliminary injunction or execute an immediate writ of mandamus directing the federal Defendants to rescind their approval of the rent increase applicable to the Plaintiffs on and after 5/1/75.

F.

Execute a writ of mandamus compelling the federal Defendants to provide and continue to provide the additional assistance payments to the private Defendants so as to offset the increase in operating costs above the initial operating expense level.

G.

Enter a permanent injunction against the private Defendants and their agents, successors, employees and attorneys, restraining them from collecting from, seeking to collect from, seeking to evict or evicting the Plaintiffs and their class for failing to pay any rental increase at the Uplands Apartments until the additional assistance payments provided by the Housing and Community Development Act of 1974 have been applied for and exhausted.

H.

Enter its order assessing the costs of this proceeding against the Defendants and order such further relief as the Court deems just in the premises.

/s/ Lawrence B. Coshnear
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PHONE: 539-5340

/s/ H. Robert Erwin, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. H-75-506

[Filed 26 June, 1975]

BARBARA ROSS, et al., PLAINTIFFS

*v.*

COMMUNITY SERVICES, INC., et al., DEFENDANTS

## ANSWER OF FEDERAL DEFENDANTS

Come now the Federal Defendants Carla A. Hills, H. R. Crawford and Everett H. Rothschild, for their answer and admit, deny and allege as follows:

1. Federal Defendants admit that an Appropriations Act (Pub. L. 93-414) was signed into law on December 27, 1974. The remaining allegations of paragraph 1 of the complaint contain conclusions of law to which no answer is required; to the extent that an answer is deemed to be required, it is denied.
2. Paragraph 2 of the complaint does not require a response. To the extent that it is deemed to require an answer, it is denied.
3. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.
4. Paragraph 4 of the complaint is admitted.
5. Federal Defendants admit the first sentence but deny the second sentence of paragraph 5 of the complaint.
6. Federal Defendants admit that the Secretary of Housing and Urban Development (HUD) is required to establish a reserve fund from all rentals collected

in excess of basic rental charges but deny all remaining allegations contained in paragraph 6 of the complaint.

7. Federal Defendants are without knowledge or information sufficient to form a belief as to whether plaintiffs will be evicted. Federal Defendants deny the remaining allegations of paragraph 7 of the complaint.

8. Paragraph 8 of the complaint contains legal conclusions to which no answer is required; to the extent that an answer is deemed to be required, it is denied.

9. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint.

10. Paragraph 18 of the complaint is admitted.

11. Paragraph 19 of the complaint is admitted.

12. Paragraph 20 of the complaint is admitted.

13. Defendants deny the last sentence of paragraph 21 of the complaint but admit the remaining allegations contained therein.

14. Paragraph 22 of the complaint is admitted.

15. Paragraph 23 of the complaint is denied.

16. Paragraph 24 of the complaint is admitted.

17. Federal Defendants deny that defendants Crawford and Rothschild can be sued in their official capacities. Federal Defendants admit the remaining allegations contained in paragraph 25 of the complaint.

18. Paragraph 26 of the complaint contains conclusions of law to which no answer is required; to the extent that an answer is deemed to be required, it is denied.

19. Federal Defendants admit that HUD has prescribed certain requirements with respect to the operation of low income housing under 12 U.S.C. 1715z-1 and, furthermore, has entered into a regulatory agreement with the private defendants as alleged in para-

graphs 27, 28 and 29 of the complaint. Federal Defendants affirmatively aver that such requirements and the regulatory agreement are not fully set forth in the complaint and, furthermore, speak for themselves

20. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 30 and 31 of the complaint.

21. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 32 of the complaint. Federal Defendants deny the second sentence of paragraph 32.

22. Federal Defendants admit paragraph 33 of the complaint.

23. Federal Defendants admit that an operating expense level has not been established but deny the remaining allegations of paragraph 34 of the complaint. Federal Defendants affirmatively aver that steps are being taken to establish an operating expense level for the Uplands Apartments pursuant to this Court's order.

24. Federal Defendants affirmatively aver that they have made payments to the private defendants for the months of May and June, 1975, pursuant to this Court's order. Federal Defendants deny the remaining allegations of paragraph 35 of the complaint.

25. Federal Defendants admit that payments for increased property taxes and utility costs had not been made from the reserve fund established under 12 U.S.C. 1715z-1(g). Federal Defendants deny the remaining allegations of paragraph 36 of the complaint.

26. Federal Defendants deny paragraphs 37, 38, 39, 40 and 41 of the complaint.

27. Federal Defendants deny each and every allegation of the complaint not hereinbefore specifically admitted.

*First Affirmative Defense*

28. Federal Defendants affirmatively allege that plaintiffs have failed to state a claim upon which relief may be granted.

*Second Affirmative Defense*

29. Federal Defendants affirmatively allege that this Court lacks jurisdiction over Defendants Crawford and Rothschild because they cannot be sued in their official capacities.

Wherefore, Federal Defendants pray:

(A) That this Court dismiss the complaint with prejudice.

(B) That plaintiffs be assessed the costs of this litigation.

(C) For such other and further relief as this Court deems just and equitable.

Respectfully submitted,

/s/ Rex E. Lee
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Assistant Attorney General

/s/ Jervis S. Finney
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## CERTIFICATE OF SERVICE

I hereby certify the copies of the foregoing Answer of Federal Defendants were served upon the following persons:

Mr. Lawrence Coshnear
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Attorney For Plaintiffs

Mr. Mark K. Joseph
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Baltimore, Maryland 21201
Attorney For Private Defendants

Dated: June 25, 1975

/s/ Paul T. Michael
PAUL T. MICHAEL
Attorney For Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. H-75-506

[Filed 19 May, 1975]

BARBARA ROSS, et al., PLAINTIFFS

*vs.*

COMMUNITY SERVICES, INC., et al., DEFENDANTS

## ORDER

Upon consideration of the briefs filed in the instant case and the oral arguments of counsel for all parties hereto and the Court having made certain findings of facts and conclusions of law under F.R. Civ. P., Rule 52, which findings and conclusions are filed separately from this ORDER, and the Court having concluded that a preliminary injunction should be entered pending further proceedings in this case, it is this 19th day of May, 1975,

ORDERED THAT

1) The class of persons herein which plaintiffs represent is certified as those tenants of the Uplands Apartment Complex (Uplands) whose incomes do not exceed eighty (80%) perecent of the median income for the Baltimore SMSA and whose HUD approved basic rents on May 1, 1975, exceed thirty (30%) percent of their adjusted gross income being those four hundred and twenty-four (424) tenants listed on Exhibits A and B attached hereto;

2) The federal defendants herein as promptly as possible determine: (a) the initial operating expense level for the Uplands Apartments Complex (Uplands) at the time the property became fully occupied, taking into account customary vacancy rates; and (b) that portion of the increases in rentals approved by HUD attributable

to the excess of the sum of the cost of utilities and local property taxes over the initial operating expense level;

3) Pending the determinations required in paragraph 2 here of, the class of persons herein and HUD, respectively, each shall immediately pay to the Uplands one-half (½) of the rental increase effective May 1, 1975; and

FURTHER ORDERED

This Court will retain jurisdiction over the parties herein to insure that this Order is properly effectuated.

/s/ Alexander Harvey II
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. H-75-506

BARBARA ROSS, et al., PLAINTIFFS

*v.*

CARLA A. HILLS, et al., DEFENDANTS

## AFFIDAVIT OF CARLA HILLS

Carla A. Hills, being duly sworn, deposes and says:

1. I am the Secretary of the Department of Housing and Urban Development. All of the functions, powers and duties of the Department, including those powers conferred by Section 236 of the National Housing Act, as amended, are vested in the Secretary. 12 U.S.C. 1702.

2. It is the purpose of this affidavit to inform the Court of the basis of my decision not to implement the statutory authority to make operating subsidy payments to the owners of projects insured under Section 236 of the National Housing Act, as amended, for this fiscal year.

3. Section 236(f)(3) of the National Housing Act, as amended, authorizes the Secretary to enter into contracts to make operating subsidy payments to the owners of Section 236 projects. It also provides the Secretary with the authority to make operating subsidy payments when they become due under the terms of these contracts. The dollar amount of contracts authorized to be entered into under this grant of authority, however, is limited by the amount of unreserved contract authority released by Congress for purposes authorized by Section 236. By releasing such contract authority in appropriation acts, Congress places a statutory ceiling on the dollar amount of contracts to make future payments which may be entered into by the Secretary.

4. As of September 30, 1975, the most recent date for which figures are available, the Department had an unreserved balance of contract authority in an amount aggregating $97,824,746 for contracts authorized by Section 236 of the National Housing Act, as amended. However, this total includes $7,067,256 in program reservations which had been made but not formally recorded on the Department's accounting records. Therefore, as a realistic matter, the Department had available Section 236 contract authority aggregating only $90,757,490 on that date. Under the terms of Section 236 of the National Housing Act, as amended, this unreserved balance could be utilized for three distinct purposes:

a) contracts for interest reduction payments authorized by Section 236(a), as amended;

b) contracts for deep subsidy payments authorized by Section 236(f)(2), as amended; and

c) contracts for operating subsidy payments authorized by Section 236(f)(3) and (g), as amended.

5. The cost of implementing each of these programs has been estimated by the Department as follows:

A. *Cost of Implementing the Interest Reduction Program*

Interest reduction payments authorized by Section 236(a) of the National Housing Act, as amended, are periodic subsidy payments made by the Department to mortgagees in order to reduce the mortgagor's (Section 236 project owner's) interest costs on a market-rate FHA-insured project mortgage. The interest subsidy, in turn, makes possible lower rentals to be paid by the project's tenants. Prior to January 5, 1973, the date of the Department's suspension of the Section 236 interest reduction program, the Department represented to certain entities, such as State and local governments, regional councils of government, local urban renewal, redevelopment or model cities authorities, developers of federally

assisted new community projects, and the military, that it would enter into contracts with such entities for interest reduction payments on projects which were then being developed. Such entities proceeded with the preparation of plans for projects in reliance on these representations. After the program suspension in January of 1973, the Department announced that it would honor these promises which it termed "bona fide commitments." Among the proposed projects which received bona fide commitments are those necessary to provide needed housing for the elderly, for disaster victims, for areas determined to have a substantial need for accommodations for military personnel, for federally assisted new community projects, and to meet the statutory relocation housing requirement for urban renewal areas. I am informed that failure by the Department to honor such bona fide commitments would create chaotic conditions for such entities, which, in reliance upon the Department's representations, have expended funds in preparation for the development of a project. I am also informed by my staff that these difficulties would be compounded in instances where the development of such projects is necessary to meet the low cost housing, relocation or other program requirements for federally assisted urban renewal, model cities or new community activities. The Department has estimated, on the basis of a project-by-project count, that the total cost of honoring outstanding bona fide commitments is $48.6 million. This estimate was based upon the following data:

1) Bona fide commitments to 38 State-aided Section 236 projects, comprising some 13,563 units, are currently outstanding. The cost of making interest reduction payments on behalf of these projects, based upon current figures concerning

the mortgage amount for each project, amounts to $37,965,201;

2) Bona fide commitments to 56 non-State-aided Section 236 projects, comprising some 7,397 units, are currently outstanding. The cost of making interest reduction payments on behalf of these projects, based upon current figures concerning the mortgage amount for each project, amounts to $10,673,871.

The Department therefore has set aside and intends to utilize $48.6 million of the unreserved balance of Section 236 contract authority for bona fide commitments.

In addition to its obligation to honor outstanding bona fide commitments, the Department has entered into agreements with housing finance agencies the effect of which is to amend contracts for interest reduction payments on new Section 236 projects by increasing the amount of the interest reduction subsidy. Approximately two-thirds of these amendments will be made on behalf of projects assisted by State governments. Such amendments became necessary when the construction, debt service or other development costs of the sponsor exceed those estimated at the time that a fund reservation is made for the project. Where such increased costs lead to an increase in the principal or interest on the project mortgage, an increase in the amount of the interest reduction subsidy is necessary to insure the project's feasibility. These agreements to amend outstanding contracts under certain conditions constitute agreements to reserve contract authority and utilize it for such amendments.

The Department estimates the cost of outstanding amendments to contracts for interest reduction payments at $10.3 million. This estimate is based upon the following data:

1) There are currently outstanding 99 agreements between HUD and State-aided Section 236 projects to amend each project's contract for interest reduction payments. The sum of the cost of these 99 amendments amounts to $4,682,463;

2) In addition to the amendments on State-aided projects, the Department has agreed to amend contracts for interest reduction payments on non-State-aided projects. The current average cost of these amendments is $1.9 million quarterly. Based upon this figure, the estimated cost of these amendments for the balance of Fiscal Year 1976 (9 months) amounts to $5.7 million.

In order to meet its commitments under these agreements, the Department will utilize $10.3 million of the unreserved balance of Section 236 contract authority.

B. *Costs of Implementing the Deep Subsidy Program*

Section 236(f)(2) of the National Housing Act, as amended, directs the Secretary to make so-called deep subsidy payments with respect to 20 percent of the dwelling units in any project assisted under a contract with the Department executed after August 22, 1974, the date of enactment of the Housing and Community Development Act of 1974. The minimum cost of making such deep subsidy payments, pursuant to the requirements of Section 236(f)(2) of the National Housing Act, as amended, has been estimated at $29 million for the balance of Fiscal Year 1976, and the transition quarter which ends September 30, 1976. This estimate is based upon the following data:

1) There are currently 69,753 Section 236 units which were not placed under con-

tract with the Department on or before August 22, 1974;

2) The Department estimates that the families occupying 30 percent of the Section 236 units nationwide will be eligible for deep subsidy payments. This 30 percent figure represents the average of: (1) the statutory requirement that 20 percent of the units in each Section 236 project be eligible for deep subsidy payments; and (2) the statutory authority, which the Department has exercised, to increase the 20 percent requirement to meet the housing needs of elderly families. Forty percent of the units in elderly projects will be eligible for deep subsidy payments.

3) The current average per unit cost of making deep subsidy payments amounts to $1,700 annually.

Therefore, in order to make the required deep subsidy payments for the balance of Fiscal Year 1976, and in the transition quarter, my staff informs me that the Department will utilize $29 million of the unreserved balance of Section 236 contract authority. In the event that the Department exercises the authority, set forth in Section 236(f)(2)(A) and (B), as amended, to increase further the percentage of units in each project eligible for deep subsidy payments, an amount in excess of $29 million will be necessary to implement the deep subsidy program.

In addition to this sum, I am told that the Department will utilize $2.9 million of Section 236 contract authority to make deep subsidy payments to projects which had received a commitment by the Department for interest reduction payments prior to August 22, 1974, but which were not finally endorsed nor receiving interest reduction payments until after that date. An amount in

excess of $2.9 million is estimated to be required for a full implementation of the deep subsidy program for these projects. However, the Department's balance of unreserved Section 236 contract authority will aggregate only $2.9 million after $48.6 million is utilized for bona fide commitments, $10.3 million is utilized for amendments to contracts for interest reduction payments, and $29 million is utilized for deep subsidies. Since the total unreserved balance is $90.8 million, the only balance remaining to complete implementation of the deep subsidy program is $2.9 million.

C. *Costs of Implementing the Operating Subsidy Program*

After the enactment of the Housing and Community Development Act of 1974, on August 22, 1974, former Secretary of the Department of Housing and Urban Development James T. Lynn requested that the Department estimate the cost of implementing the operating subsidy program for Fiscal Years 1975 and 1976. Thereafter, a nationwide survey was conducted by the Department's Office of Loan Management in order to develop the required cost estimates for implementation of the program. This survey covered one-third of the universe of Section 236 projects nationwide. On the basis of the financial information obtained as a result of this survey, the Department estimated that it would cost $2,717,000 per month to implement the operating subsidy program in Fiscal Year 1975, and $4,289,000 per month to implement that program in Fiscal Year 1976.

On the basis of this estimate, my staff informs me that the operating subsidy program for Fiscal Year 1976 would require an amount aggregating approximately $51.4 million. The Department would require for that purpose $51.4 million of the unreserved balance of Section 236 contract

authority. Furthermore, since the costs of implementing the operating subsidy program will accelerate each year due to the general inflation in property taxes and utility costs, the Department will require contract authority greatly in excess of $51.4 million to implement that program in subsequent fiscal years.

6. In Fiscal Year 1975 and thus far in Fiscal Year 1976, the Department utilized its unreserved balances of Section 236 contract authority to meet bona fide commitments to make interest reduction payments, amendments to contracts for interest reduction payments, and for contracts to make deep subsidy payments. The current unreserved balance of Section 236 contract authority has been programmed for the same purposes.

7. The sum of $90.8 million of unreserved Section 236 contract authority is not sufficient to permit the Department to contract to cover the estimated costs of implementing the interest reduction, deep subsidy and operating subsidy programs for the current fiscal year. The estimated cost of such an implementation exceeds $142 million. The $90.8 million of unreserved Section 236 contract authority will be exhausted by the Department in meeting its obligations to honor bona fide commitments to make interest reduction payments, to amend contracts for interest reduction payments, and to make deep subsidy payments. In light of the insufficiency of the Department's unreserved balance of Section 236 contract authority to implement all of the programs authorized by Section 236 of the National Housing Act, as amended, and upon the basis of staff analysis, I have determined that it is not feasible to implement the operating subsidy program for this fiscal year.

8. Although the Department cannot implement the operating subsidy program for this fiscal year, it will continue to take actions designed to alleviate the financial difficulties which motivated Congress to enact the operating subsidy amendments to Section 236 of the National Housing Act. The operating subsidy amendments were enacted to alleviate the financial hardships, generated by

escalating utility rates and tax increases, which threaten the owners of HUD subsidized, multifamily projects and the tenants residing in those projects.

The Department has considered a number of alternative solutions to these financial problems and has begun to implement some of them. For example,

a) Since February 1975, the Department has been operating under a moratorium on foreclosures of certain subsidized multifamily projects;

b) Relief procedures, such as modification and suspension of the requirement that project owners maintain a reserve for replacement, have been liberalized;

c) Owners of Section 236 projects, in computing excess income which must be paid to HUD and placed in the reserve fund, are permitted to deduct rents determined to be uncollectible and rent losses on unoccupied units; and

d) A system has been instituted to alert HUD field office personnel of possible or pending defaults so that action to avoid the default can be taken before it occurs.

In addition to these actions, the Department has proposed and is preparing to implement a plan to allocate Section 8 subsidies, authorized by the Housing and Community Development Act of 1974, to those FHA-insured projects which are in danger of defaulting on their mortgage obligations. Such an allocation will assist occupants of Section 236 projects and other FHA-insured projects who, because of insufficient income, are unable to pay the rent required to support the project. The families occupying units in Section 236 projects which receive the benefit of Section 8 assistance will pay no more than 15 to 25 percent of their adjusted income toward rent. The balance of the approved rent for the unit will be paid to the project owner in Section 8 subsidies. No Section 236 contract authority will be required for

implementation of this plan which will begin in this fiscal year.

9. In light of my determination that it is not feasible to implement the operating subsidy program for this fiscal year, I have not instructed HUD field office personnel to begin calculating the initial operating expense levels for Section 236 projects nationwide. These calculations would necessitate the expenditure by the Department of a great deal of time, effort and funds and, absent an ability to implement the operating subsidy program would have no effect whatsoever upon the financial difficulties facing HUD-subsidized multifamily projects. Moreover, at any time that a decision is made by the Department to implement the operating subsidy program, the calculation of the initial operating expense levels can be made with no prejudice or resultant hardship to those projects eligible for such payments.

In light of the insufficiency of the Department's unreserved balance of Section 236 contract authority to implement all of the programs authorized by Section 236 of the National Housing Act, as amended, and the actions taken by the Department to alleviate the financial difficulties facing the owners and tenants of HUD-subsidized multifamily projects, it is my judgment that the utilization of available Section 236 contract authority for bona fide commitments, amendments to contracts for interest reduction payments, and deep subsidy payments, to the exclusion of operating subsidies, is in the national interest and is required to meet the Department's outstanding

obligations and commitments under Section 236 of the National Housing Act, as amended.

/s/ Carla A. Hills
CARLA A. HILLS
Secretary

Subscribed and sworn to before me this 29th day of December, 1975.

/s/ Patricia A. Gifford
Notary Public

My Commission Expires Jan. 31, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. H-75-506

[Received May 12, '75, 4:50 PM]

BARBARA ROSS, et al., PLAINTIFFS

*vs.*

COMMUNITY SERVICES, INC., et al., DEFENDANTS

## AFFIDAVIT OF H. R. CRAWFORD

H. R. Crawford, being duly sworn, deposes and says:

1. I am the Assistant Secretary for Housing Management of the Department of Housing and Urban Development (HUD), and as such, I have responsibility pursuant to a delegation of authority from the Secretary published at 36 F.R. 5005, as amended, for all housing management functions of HUD, including all management activities under the National Housing Act, as amended:

2. The Department is extremely concerned with the problems threatening the economic viability of HUD insured and subsidized multifamily housing projects as well as the financial burdens imposed upon the low- and moderate-income tenants of these projects who must pay higher rents to meet the continuing rise in operating costs. Sharp rises in property taxes, utility rates and the cost of other goods and services essential to the operation of multifamily housing projects have brought about an alarming acceleration in the rate of defaults in mortgage payments by the owners of such projects. It is the position of the Department that a broad strategy, which will address itself to the problems of all HUD assisted multifamily projects, is necessary to alleviate what has become a financial crisis.

3. The operating subsidy provisions of Section 212 of the Housing and Community Development Act of 1974

is an attempt by the Congress to address the problem of increased operating costs in Section 236 projects by providing additional subsidies to the project owner. However, Section 212 does not authorize additional assistance for HUD assisted multifamily projects insured under other sections of the National Housing Act which face identical problems.

4. Section 212 of the Housing and Community Development Act of 1974 authorizes the payment of operating subsidies to Section 236 project owners only to the extent necessary to maintain the basic rental charges for tenants at levels not in excess of 30 percent of their gross income. Therefore, the benefit of operating subsidies flows only to those Section 236 projects which are occupied by tenants whose basic rental charge exceeds 30 percent of their gross income. There are Section 236 projects in which a majority or all of the tenants occupying its units pay a rental charge which does not exceed 30 percent of their gross income. Consequently, the payment of operating subsidies will have little or no ameliorating effect upon the economic difficulties threatening the owners of a number of Section 236 projects.

5. The payment of operating subsidies solely to Section 236 project owners, therefore, is inequitable in providing relief only to a small proportion of HUD assisted multifamily projects and to an even smaller group of beneficiaries—those owners of Section 236 projects whose tenants have a basic rental charge exceeding 30 percent of gross income. In view of the need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD assisted multifamily projects, the Department is currently considering a number of alternative proposals for solutions that are more comprehensive and more equitable.

6. There are two basic approaches to affect the cash flow problems facing multifamily projects without raising the rental charges that the tenants must pay. The first is to provide additional subsidies for the projects to increase operating income. This approach does not

affect the amount of the mortgagor's debt service payments. The other option is to decrease the debt service on the mortgage thereby freeing additional income for the operation of the project. There are a number of alternative methods to achieve the goals of each of these options. Some of the alternatives currently being considered by the Department are as follows:

(a) A policy whereby mortgages are assigned to HUD and then recast to require a payment of principal and interest based upon current and foreseeable project income. The balance of the principal would not become due until the expiration date of the original indebtedness;

(b) A policy whereby Section 8 units, authorized by the Housing and Community Development Act of 1974, would be allocated to distressed multifamily projects, thereby providing a base of rental income for the project which would rise with inflationary cost increases as they are sustained, and not affect the rent the tenants must pay;

(c) A policy which permits Section 236 project owners to offset rents collected in excess of the basic rental charge against uncollected rents as a cushion against increased operating costs. Consideration is also being given to making this procedure retroactive for the excess rental collections which have been remitted to HUD pursuant to Section 236(g) of the National Housing Act, as amended;

(d) A policy permitting extensions in the maturity date of the mortgage, thereby decreasing the project's debt service payments;

(e) A policy which permits the transfer of nonprofit projects to limited distribution ownership to improve management, i.e., management which is motivated by existing benefits available to owners of subsidized projects;

(f) A policy which authorizes an increase in the tenant income limits for subsidized projects which, coupled with the increased use of rent supplements, would provide an increase in rental income while at the same time cushioning the impact of increased operating costs on lower income tenants; and

(g) A legislative proposal to permit payment of a partial insurance claim (out of the insurance fund established by Section 238 of the National Housing Act, as amended) to the project owner which would reduce his mortgage indebtedness to a monthly amortization which he can afford to pay out of current income. A second note mortgage for the amount of the insurance claim paid would be held by HUD and be repayable under terms consisting of favorable interest rates and a deferred start of amortization.

7. As is set forth in the Affidavit of Jack A. Meyer, a *Multifamily Defaults Study* was undertaken within the Department at the request of former HUD Secretary James T. Lynn. This study probed many of the alternatives currently being considered by the Department to alleviate the default problem in HUD-assisted multifamily projects and evaluated the potential effectiveness of each alternative proposal. In addition, the Department helped launch a $700,000 research and demonstration effort to gain new insight and answers to problems besetting some 60 financially troubled multifamily housing projects in the New York City area. These projects contain 16,500 dwelling units and represent mortgages totaling almost $370 million.

8. Earlier in the year, the Department announced a temporary suspension of further referrals to the Department of Justice of addditional foreclosures of HUD subsidized multifamily projects owned by nonprofit and limited dividend mortgagors, except in the case of abandonment or similar circumstances. In an effort to obtain the views of all interested public and private sources concerning HUD's policies on defaults in all HUD sub-

sidized multifamily projects and the impact of defaults upon the low- and moderate-income tenants residing in such projects, the Department held public hearings on May 5 and 6, 1975. These hearings were designed to solicit the proposals of tenant groups, project owners and other representatives of the community at large on alleviating the default problem so that these proposals can be added to those currently being considered by the Department.

9. While the Department is engaged in examining the potential effectiveness of alternative proposals designed to alleviate the financial difficulties of all HUD insured and subsidized multifamily projects and the adverse impact of these difficulties upon the tenants of such projects, it has no plans to implement the provisions of Section 236(f)(3) and (g) of the National Housing Act, as amended, which authorize the payment of operating subsidies to Section 236 project owners. It is the position of the Department that the alternative proposals currently being considered provide a broader approach to the economic difficulties threatening multifamily project owners as well as the tenants of such projects.

10. Secretary Hills, Under Secretary Mitchell and I appeared before the Senate Committee on Appropriations on April 21 and 22, 1975. At these hearings, the intent of the Department not to implement the statutory authority to pay operating subsidies to Section 236 project owners, at this time, was made clear to the committee. The committee was concerned with options being considered by the Department to alleviate the multifamily default problem as well as the financial difficulties threatening the tenants of these projects. The Secretary, the Under Secretary and I discussed some of the alternatives being considered by the Department as well as some of the methods proposed for their implementation. I also appeared before the Subcommittee on HUD and Other Independent Agencies of the House Committee on Appropriations at hearings held on April 14 through 18, 1975. At these hearings, the Subcommittee was informed of the Department's intent with respect to the implementation of the statutory authority to pay operat-

ing subsidies under the Section 236 program. Departmental spokesmen will continue to keep those committees fully informed concerning the progress made in the development of alternative solutions and the possible need for legislation in this area.

/s/ H. R. Crawford
H. R. CRAWFORD
Assistant Secretary
for Housing Management

Subscribed and sworn to before me on this 9th day of May, 1975.

[SEAL]

/s/ Julius M. Williams
Notary Public
My Commission expires 7/14/76

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. H-75-506

[Received May 12, '75, 4:50 PM]

BARBARA ROSS, et al., PLAINTIFFS

*vs.*

COMMUNITY SERVICES, INC., et al., DEFENDANTS

## AFFIDAVIT OF ALBERT J. KLIMAN

Albert J. Kliman, being duly sworn, deposes and says:

1. I am the Director of the Office of Budget of the Department of Housing and Urban Development. In that capacity I serve as the adviser to and representative of the Assistant Secretary for Administration in matters relating to budget formulation and execution, and as adviser to the Secretary and Under Secretary with respect to these matters. I am responsible for the development of budget plans, policies and procedures, and for the overall supervision of the Office of Budget. The principal responsibilities of the Office of Budget are:

(a) To advise the Assistant Secretary for Administration and other high level officials of the Department including the Secretary and Under secretary on budget matters, including the budgetary implications of policy and legislative proposals;

(b) To advise Assistant Secretaries and staff officers on their budgetary responsibilities, to evaluate the effectiveness of these activities and to exercise technical and functional supervision with respect to all budget activities throughout the Department; and

(c) To prepare or review all consolidated or Department-wide budget estimates for submission to Office of Management and Budget and the Congress.

2. It is the purpose of this affidavit to state the manner in which the Congress has made available contract authority and appropriated funds to carry out the provisions of Section 236 of the National Housing Act, as amended. It is also the purpose of this affidavit to state how the Department has programmed the unreserved balance of contract authority made available by Congress to carry out the Section 236 program.

3. "Contract authority," as used in this affidavit, refers to the means by which contracts are entered into under statutory authority which provides for a commitment of Federal fund payments, now and in the future, up to a stipulated limit, prior to an apropriation of funds for the liquidation of such contracts. With respect to the Section 236 program, contract authority permits the Department to enter into contracts to make annual payments, such as interest reduction payments, which are authorized by Section 236 of the National Housing Act, as amended, for certain future periods. Congress makes contract authority available under the Section 236 program through a two step process. First, there must be an authorization of contract authority contained in the substantive legislation. Second, the contract authorization, or portion thereof, must be released to the Department in an appropriations act. The Department may then enter into contracts to make annual payments authorized by Section 236 up to the limit established in the appropriations act releasing such contract authority.

4. "Appropriation," as used in this affidavit, refers to an authorization in an appropriations act to draw funds from the Treasury for specified purposes and to make disbursements of these funds. With respect to the Section 236 program, appropriations provide the Department with funds to liquidate contracts for payments authorized by Section 236 of the National Housing Act, as amended, which were entered into pursuant to contract authority released by Congress for that purpose.

5. Congress has released no contract authority specifically for contracts for the payment of operating subsidies authorized by Section 236(f)(3) and (g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974. Section 236(i) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, authorized $75,000,000 of contract authority, subject to release in appropriations acts, to carry out the provisions of Section 236 of the National Housing Act, as amended, in Fiscal Year 1975. However, the Congress has released no contract authority pursuant to this authorization.

6. Although Congress has released no new contract authority for the Section 236 program, it has authorized the Department to use the contract authority it currently has available to carry out the provisions of Section 236 of the National Housing Act, as amended, to enter into contracts for the payment of Section 236 operating subsidies. See: Senate Report No. 93-1255, accompanying H.R. 16900, 93d Cong., 2d Sess., October 9, 1974, and H. Rpt. No. 93-1503, accompanying H.R. 16900, 93d Cong., 2d Sess., November 26, 1974.

7. As of July 1, 1974, the Department had an unreserved balance of contract authority in an amount aggregating $181,363,000 for contracts authorized by Section 236 of the National Housing Act, as amended. This unreserved balance has been programmed by the Department in the following manner:

(a) For Fiscal Year 1975

(1) $70 million for bona fide commitments to make interest reduction payments on new projects secured by mortgages insured under Section 236 of the National Housing Act, as amended. Bona fide commitments refer to promises made by the Department to enter into contracts for interest reduction payments on projects planned for the future, e.g., projects to be included in an urban re-

newal area in which development is not yet complete.

(2) $17.1 million for amendments to contracts for the payment of interest reduction payments on state-aided projects as authorized by Section 236(b) of the National Housing Act, as amended; and

(3) $21.1 million for the payment of "deep subsidies" mandated by Section 236(f)(2) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974.

(b) For Fiscal Year 1976

(1) $66.1 million for bona fide commitments to make interest reduction payments on new projects secured by mortgages insured under Section 236 of the National Housing Act, as amended; and

(2) $7.1 million for the payment of "deep subsidies" mandated by Section 236(f)(2) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974.

As is indicated above, the Department has programmed its entire unreserved balance of contract authority for purposes other than contracts for the payment of operating subsidies.

8. Section 236(g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, provides that Section 236 project owners shall periodically pay to the Secretary all rental charges collected in excess of basic rental charges and that these excess rental charges shall be placed in a reserve fund by the Secretary. This section goes on to state that the Secretary may use the excess rental charges in the reserve fund to make operating subsidy payments to project owners by crediting the reserve funds to the

appropriation authorized by Section 236(i), as amended. Section 236(i), as amended, in addition to authorizing appropriations to carry out the Section 236 program, provides that the Secretary has no more contract authority than that granted by appropriations acts. Therefore, the Department can use the $31,556,312 balance in the reserve fund for the payment of operating subsidies *only* to the extent that there exists sufficient unreserved contract authority released by Congress for that purpose. However, as is indicated in paragraph 7, the Department has programmed its entire unreserved balance of contract authority for purposes other than contracts for the payment of operating subsidies.

9. In Public Law 93-414, 93d Cong., 2d Sess., Congress appropriated $2,300,000,000 for payments authorized by Section 10 of the United States Housing Act of 1937, as amended, Title IV of the Housing Act of 1950, as amended, Section 101 of the Housing and Urban Development Act of 1965, as amended, and "for homeownership and interest reduction payments as authorized by Section 235 and 236 of the National Housing Act, as amended, . . . ."

Congress expressly limited the use of those funds appropriated by Public Law 93-414 for the Section 236 program to the payment of interest reduction payments as authorized by Section 236(a) of the National Housing Act, as amended. Therefore, none of the funds appropriated pursuant to Public Law 93-414 for the Section 236 program may be used for the payment of operating subsidies authorized by Section 236(f)(3) and (g) of the National Housing Act, as amended.

/s/ Albert J. Kliman
ALBERT J. KLIMAN
Director, Office of Budget

Subscribed and sworn to before me on this 9th day of May, 1975.

/s/ Bernard E. Banks
Notary Public
My Commission expires
June 30, 1976

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. H-75-506

BARBARA ROSS, ET AL., PLAINTIFFS

*v.*

COMMUNITY SERVICES, INC., ET AL., DEFENDANTS

## AFFIDAVIT OF ROBERT C. ODLE, JR.

Robert C. Odle, Jr., being duly sworn, deposes and says:

1. I am the Acting Assistant Secretary for Housing Management of the Department of Housing and Urban Development (HUD). Pursuant to a delegation of authority published at 36 F.R. 5005, as amended, my responsibilities encompass all of the Department's housing management functions including all management activities under the National Housing Act.

2. The purpose of this affidavit is to supplement the Affidavit of Mr. Albert J. Kliman, previously submitted to the Court, with respect to the excess rental reserve fund established by Section 236(g) of the National Housing Act, as amended. It is also the purpose of this affidavit to bring to the Court's attention the facts surrounding the Department's decision to refund to certain owners of projects insured under Section 236 of the National Housing Act, a substantial portion of the sums previously derived from them and previously credited to the excess rental reserve fund established by Section 236(g) of the National Housing Act, as amended.

3. The Affidavit of Mr. Kliman stated that the excess rental reserve fund contained $31,556,312.00 at the time such affidavit was submitted to this Court. As of October 31, 1975, the excess reserve fund contained $40,647,789.00. No mention was made in Mr. Kliman's Affidavit of a potential charge upon the balance in the

excess rental reserve fund. The potential charge on the excess rental reserve fund is explained below.

4. Section 236 was added to the National Housing Act in 1968 to encourage private enterprise to engage in the development of good rental and cooperative housing for lower income families. It authorizes the provision of mortgage insurance and assistance in the form of periodic subsidy payments to an eligible mortgagee in order to reduce the mortgagor's interest costs on a market rate FHA-insured project mortgage down to one percent per annum. The interest subsidy, in turn, makes possible lower rentals to be paid by those occupants who qualify for Section 236 assistance. The rent a tenant must pay is derived through the use of two principles: The "basic rental charge" and the "fair market rental charge". The former is determined on the basis of operating the project with payments of principal and interst due under a mortgage bearing interest at the rate of 1 percent per annum. The latter is determined on the basis of operating the project with payments of principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage.

A qualified tenant must pay the "basic rental charge" or 25 percent of his adjusted income, whichever is greater. However, in no case will a tenant's rental payment exceed the "fair market rental charge".

5. Prior to the 1974 amendments to Section 236, Section 236(g) provided that project owners, "shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be deposited by the Secretary in a fund which may be used by him as a revolving fund for the purpose of making interest reduction payments. . . ."

6. This statutory requirement was inserted into the "regulatory agreement" which constitutes a contract between HUD and the project owner (mortgagor) for Section 236 assistance. Each regulatory agreement provides in pertinent part that the project owner shall remit each month to the Department, together with the appropriate reporting form, the amount by which the total rentals

collected on the dwelling units exceed the sum of the approved basic rentals for all occupied units. Project owners are required to remit excess rentals to the Department along with HUD Form 3104, "Monthly Report of Excess Income" (Exhibit A). Instructions for calculating such excess rents were set forth in HUD's Insured Project Servicing Handbook.

7. In the latter part of 1973, it came to the attention of HUD's Office of Loan Management, the office responsible for implementing Section 236(g), that a great deal of uncertainty existed on the part of Section 236 project owners concerning the computation of excess rentals. After a review, which began in early 1974, the Office of the Assistant Secretary for Housing Management determined that the manner in which most project owners were computing excess income was not consistent with the statutory requirement as set forth in the regulatory agreement. Because of insufficient instructions accompanying HUD Form 3104, project owners had been making monthly computations of excess rents on a noncumulative basis which provided no offset for rents not collected in prior months. As a result of these miscalculations, project owners were erroneously remitting the HUD amounts in excess of the amounts due under the statutory requirement. The following example is instructive in demonstrating the manner in which this inequitable situation arose:

| Basic Rent | Tenant Owes | (Cumulative) Excess, If Any | Actual Rent Collected |
|---|---|---|---|
| First Month | | | |
| 120 | 150 | 30 | 150 |
| 100 | 100 | — | 100 |
| 110 | 120 | 10 | — |
| 120 | 130 | 10 | — |
| 450 | 500 | 50 | 250 |
| Second Month | | | |
| 120 | 150 | 60 | 150 |
| 100 | 100 | — | 100 |
| 110 | 240 | 20 | 240 |
| 120 | 260 | 20 | 260 |
| 450 | 750 | 100 | 750 |

As set forth in this chart, two tenants were delinquent in payment of their rent for the first month. This delinquency, however, was made up in the second month as a result of the payment of two months rent by the two delinquent tenants. In the second month, the project owner collected rents in the amount of $750, some $300 in excess of the sum of the basic rents ($450) for that month. With no allowable offset for rents not collected in the first month, a project owner would be required to remit $300 in excess rents to HUD. However, with the benefit of such an offset, the actual amount required to be remitted to HUD in the second month is $100, which equals the aggregate amount collected in excess of basic rents for the first and second months.

8. The Department determined that the excess rental requirement contained in Section 236(g), properly interpreted, requires a project owner to utilize a method of computation of excess rentals which allows an offset for rents not collected in prior months. In June 1975, final clearance was given to Transmittal No. 24 (Exhibit B), which revised HUD's Insured Project Servicing Handbook to provide the following formula for calculating excess rents:

Total month's rent collections
Less basic rents for all occupied units
Less collection losses
Will equal excess rents

In that same month, HUD Form 3104 was revised to clarify the formula for calculating excess rents. Revised Form 3104 (Exhibit C), provides for a loss incurred in one month to be carried forward so that it offsets actual rent collected in following months. This revised Form 3104 does not represent a new procedure for calculating excess rentals, but rather a clarification of the procedure which project owners should have been utilizing since the inception of the Section 236 program.

9. As a result of this clarification of the procedure for compliance with Section 236(g), a project owner now remits only the amount of excess rents properly computed

as required by statute. However, no provision has yet been made to compensate a project owner for excessive payments previously remitted to HUD prior to June 1975. I have been advised by the Office of General Counsel that the Department is legally obligated to refund overpayments erroneously remitted by a project owner as a result of an incorrect interpretation of the requirements of Section 236(g) and the regulatory agreement. On the basis of this legal opinion, the Department has developed and is preparing to implement a procedure for refunding excess rentals erroneously remitted by making the formula set forth in revised Form 3104 and Transmittal No. 24 retroactive to the date that each project owner began remitting excess rentals to HUD. The Department estimates that approximately $18 million is necessary to make these refunds.

10. On August 22, 1974, Congress enacted the Housing and Community Development Act of 1974. Section 212 of that Act amends Section 236(g) of the National Housing Act to provide that excess rentals shall be credited to a reserve fund which is available to make operating subsidy payments authorized by subsection (f)(3). This statutory provision states that, during any period that the Secretary determines that the balance contained in the reserve fund is sufficient to meet estimated appropriations authorized by Section 236(i) and be available until the end of the next fiscal year for the purpose of making operating subsidy payments. As set forth in the Affidavits of Fred W. Pfaender and Carla Hills, previously submitted to the Court, the Secretary has not made such a determination for the following reasons:

(a) the Department has estimated that it will require an amount aggregating $4.3 million per month or $51.4 million per year to meet nationwide operating subsidy requirements for Fiscal Year 1976; and

(b) the amount contained in the reserve fund was $31,556,312.00 (now $40,647,789.00 as of October 31, 1975).

11. In view of the fact that there is a charge upon the reserve fund for the sums necessary to refund excess

rentals erroneously collected prior to June 1975, the Secretary cannot determine the balance is sufficient to meet estimated operating subsidy requirements for Fiscal Year 1976. Although the Department has estimated that $18 million will be required to make such a refund the precise amount required, which can only be accurately determined after project owners submit the necessary financial records, may exceed the $18 million estimate.

/s/ Robert C. Odle, Jr.

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ROBERT C. ODLE, JR.
Acting Assistant Secretary
for Housing Management

Subscribed and sworn to before me on this 5th day of February 1976.

/s/ Bernard E. Banks

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BERNARD E. BANKS
Notary Public

My Commission Expires June 30, 1976.

CV75-3009-JWC

HILDA ABRAMS, ET AL.

*vs*

CARLA HILLS, ET AL.

## RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 9/4/75 | Fld complt. Issd sep summs.<br>Fld req & ORD for serv of process by other than the USM naming Ronald Javor |
| 9/24/75 | Fld Defts G & K Management Co., & Meyler Park Apt's ANSWER to complt |
| 10/3/75 | Fld Plt's Notc of Motn & Motn, retbel 10/20/75 10am, for S/J or in the alt Prelim Inj. With Memo of P/A in supp, Affod & Exhbts<br>Fld Pltf's Memo of P/A in supp fo S. J. or in the Alt Prelim Inj with Notc of Motn, Affid & Exhbts<br>Fld Pltf's Affod of Material Facts As to which pltfs contend there is no Genuine issue in supp of Pltf's Motn for S/J<br>LODGED Pltf's Proposed Find/Fact & Concl of law in supp of Pltf's Motn for S/J<br>LODGED Pltf's Proposed S/J |
| 10/16/75 | Fld Stip & ORD retble 11/17/75, for hrg on plts Motn for S/J, or in the alter for Prelim Injunction. |
| 10/31/75 | Fld Federal Defts' notc of motn & motn, retble 11/17/75 10am, to dism or for S/J.<br>Fld Federal Defts' oppos to Pltfs' motn for S/J or for Prelim Inj & in support of Fed Defts' motn to dism or for S/J.<br>Fld Federal Defts' exhs "A" thru "K" in support of Their oppos to Pltfs' motn, & in support of their motn. |

| DATE | PROCEEDINGS |
|---|---|

LODGED Federal Defts' proposed Find/Fact & conclusions of Law.

LODGED Federal Defts' proposed Jdgmnt.

11/4/75 Fld Stip & ORD retble dt not given, re: facts betwn Pltfs & C & K Managmnt co. & Meyl Park Apartments, defts.

11/7/75 Fld Defts Affid of Sherman Gardner in response to pltfs motn for S/J, or in the alter for prelim injunctn.

11/10/75 Fld Pltfs oppos to Defts motn for dism or in the alter for S/J & Exbts.

11/17/75 MIN ORD: Hrg motn of Fed defts for S/J; Hrg motn of pltf for S/J or in the alter for prelim injunctn; Crt ords mttrs stand submtd. Cnsl shall file stip facts and contentions re unstip facts.

Fld pltf's exhbts "Y" and "Z".

11/20/75 Fld Pltfs' Atty's certificate of personal serv of Pltf's exhs Y & Z.

11/19/75 Fld Federal Defts' Stip of Facts with Reservations.

12/12/75 LODGED Pltfs' second proposed Find/Fact & Conclusions of Law in support of Pltfs' mem in response to Crt's req of 12/4/75.

LODGED Pltfs' proposed Ord in support of Pltfs' memo in response to Crt's req of 12/4/75

Fld Separate summs retnd served as to all Govt defts.

Fld Separate summs retnd servd as to all non-Govt defts.

Fld pltfs' memo in response to the Crt's request of 12/4/75 for comment upon the proposed findgs of fact and Conclsns of law.

Fld Fed defts suppl memo of law.

12/19/75 Fld Pltf's 2nd proposed finds of fact & concl of law in supp of pltf's memo in response to the Crts reqst of 12/4/75.

| DATE | PROCEEDINGS |
|---|---|

Fld pltf's ORD in supp of pltf's memo in response to Crts reqst of 12/4/75. (Ent 12/19/75 m/cpys & ntfd prtys)

12/29/75 Fld Pltfs' Bill of Costs, retble 1/6/76 10am.
Fld Federal Defts' notc of motn & motn, retble 1/19/76 10am, for rehrg; memo in support. (2 seperate docs)

1/9/76 Fld pltfs' reply to Federal defts' motn for rehrg & exhbts.
LODGE pltfs' proposed exhbts.
Fld Fed Defts' notc of motn for stay pending decision on their motn for rehg & pend appeal, retble 1/26/76 at 10AM.
Fld Fed Defts; motn for stay pending decision on their motn for rehearing & pending appeal, with memo of law.

1/13/76 Fld Stp & ORD cont motn for rehrg to 1/26/76 at 10AM.

1/19/76 Fld pltfs' memo in oppos to Fed defts' motn for stay pending decision on their motn for rehrg & pending appeal, with exhibits.

1/21/76 Fld Fed defts' reply to pltfs' objections to pending motns.

1/26/76 MIN ORD: Crt takes under submission motn of Fed Defts for re-hrg. Motn for stay pending decision on motn for re-hrg & pending appeal is cont to 2/2/76, 10AM.

2/2/76 Fld pltfs' supplemental memo.

*1/26/76 Taxed costs in sum of $122.36, against Defts.

2/2/76 MIN ORD: Crt ORD Fed. Defts to file affis within 1 week & pltfs has 1 week thereafter to respond. Crt ORD matter to stand submitted upon filing fo the additional docs.

| DATE | PROCEEDINGS |
|---|---|

2/4/76 Fld Fed defts' exhibit M—affid of Thomas J. O'Connor; exhibit N—affid of Abner Silverman.

2/17/76 Fld pltfs' response to Fed Defts' affids submitted 2/4/76, exhibits.

4/27/76 MIN ORD: It is ORD'd that the Federal defs motn for stay pending appeal is DENIED.

4/28/76 Fld pltfs' findngs of fact & concls of law in support of pltfs' motn for S/J.

5/6/76 Fld Crt's memo opinion.

5/12/76 Fld Federal defts' NOTICE OF APPEAL w/ proof of service from final Order dated 12/19/75. (as per F.R.C.P. Rule 59(b))

5/19/76 Fld S/J & ORD Grantng pltf's mot for S/J. (Ent 5/21/76 m/cpys & ntfd prtys)

5/20/76 MIN ORD: ORD finds of fact & concl of law fld 4/28/76 are hereby stricken. (JWC) m/cpys

5/21/76 Fld Federal Defts' desig of contents of record on appeal.

6/2/76 Fld Federal defts' exbt O, affid of compliance.

6/4/76 Fld pltfs' suppl desig of contents of Record on Appeal.

6/4/76 Fld defts NOTICE OF APPEAL fr Ord ent 5/21/76 w/proof of service.

6/11/76 Fld Defts Suppl designtn of contents of Rcrd on appl.

**6/7/76 Fld Federal Deft's application & ORD for stay pending appeal.

CATHERINE M. BISHOP
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Development Law Project
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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 75 3009 JWC

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, Individualy, and as representatives of a class,

PLAINTIFFS

*vs.*

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, H. R. CRAWFORD, as Assistant Secretary for Housing Management of the United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the United States Department of Housing and Urban Development, and G & K MANAGEMENT CO., INC., and MEYLER PARK APARTMENTS, a Limited Partnership, DEFENDANTS

## COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND MANDAMUS, AND AFFIDAVITS AND EXHIBITS

### I.

### *PRELIMINARY STATEMENT*

Plaintiffs, who are all tenants in Meyler Park Apartments, a federally subsidized housing project designed for lower-income families, individually and on behalf of all others similarly situated, bring this action to enforce their rights under the National Housing Act, as amended by the Housing and Community Development Act of 1974. 12 U.S.C. § 1701 *et seq.* Plaintiffs seek declaratory and injunctive relief against federal Defendants HILLS, CRAWFORD, and CANFIELD, hereinafter federal Defendants, to declare the approval of the 10.4% rent increase illegal, as contrary to the purposes and intent of the National Housing Act and the rules and regulations promulgated pursuant thereto pertaining to the application for and approval of a rent increase request; and to enjoin federal Defendants from enforcing the approved rent increase until they comply with the duly adopted rules and regulations and implement the operating subsidy as required by 12 U.S.C. § 1715z-1(f)(3) and (g), hereinafter referred to as the operating subsidy. Congress, by enacting the operating subsidy program, provided that federal Defendants shall make additional assistance payments to project owners for increases in property taxes and utilities, above the initial operating expense level for the project, if the increases produce a rental in excess of twenty-five to thirty percent (25-30%) of the tenants' incomes. Federal Defendants have refused to implement this mandatory statutory provision. Such inaction has caused and will continue to cause Plaintiffs severe and irreparable harm. In addition, pursuant to 28 U.S.C. § 1361, Plaintiffs seek an order compelling federal Defendants to comply with the duly adopted rules and regulations and to implement the operating subsidy.

Plaintiffs further seek an order enjoining private Defendants MEYLER PARK APARTMENTS, a Limited Partnership, and G & K MANAGEMENT CO., INC., hereinafter private Defendants, from implementing the recently approved rent schedule by increasing Plaintiffs' rents from $116 to $128 per month; and an order compelling them to apply for the operating subsidy in accordance with the existing rules and regulations duly adopted by federal Defendants and in accordance with the operating subsidy provision of the Housing and Community Development Act of 1974.

## II.

## *JURISDICTION*

1. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 (federal question); 1337 (commerce clause); 1361 (mandamus), and by 5 U.S.C. § 702 (Administrative Procedure Act). As hereinafter more fully appears, this action arises under federal law, and the Acts of Congress regulating interstate in commerce. The matter in controversy exceeds the sum of $10,000 for each Plaintiff, exclusive of interest and costs. Plaintiffs bring this action to compel federal Defendants to perform duties owed to Plaintiffs and to secure judicial review of actions taken by federal Defendants.

2. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of Fed.R.Civ.Pro. and by 5 U.S.C. § 703.

## III.

## *PLAINTIFFS*

3. Plaintiff, HILDA ABRAMS, age 78, is and has been a tenant for the past three (3) years at the Meyler Park Apartments, residing alone in Apartment 106, 860 West 5th Street, San Pedro. She received notice from private Defendants that her rent would be increased from $116 to $128 per month, beginning September 1, 1975. Her "gross" income of $293 per month is from

Social Security and savings account interest. Thus, with the approved increase, her rent will constitute 43.7% of her income, and approximately 46% of her "adjusted monthly income." (Exhibit A)

4. Plaintiff, GRETA JAEGER, age 70, is and has been a tenant for the past three (3) years at the Meyler Park Apartments, residing alone in Apartment 118, 860 West 5th Street, San Pedro, California. She received notice from private Defendants that her rent would be increased from $116 to $128 per month, commencing September 1, 1975. Her "gross" income of $338.00 per month is from Social Security and savings account interest. Thus, with the proposed rent increase, her rent will constitute 38.7% of her gross income and approximately 40% of her "adjusted monthly income." (Exhibit B).

5. Plaintiff, MARGARET McEACHIN, age 74, is and has been a tenant for the past three (3) years at Meyler Park Apartments, residing alone in Apartment 117, 860 West 5th Street, San Pedro, California. She received notice from the defendants that her rent would be increased from $116 to $128 per month, beginning September 1, 1975. Her "gross" income of $357.00 per month is from Social Security and a pension. Thus, with the proposed rent increase, her rent will constitute 35.8% of her "gross income," and 37.6% of her "adjusted monthly income." (Exhibit C).

## IV.

## *CLASS ACTION*

6. The named Plaintiffs bring this action on their own behalf and, pursuant to Rule 23(a) and (b)(2) of Fed. R.Civ.Pro., on behalf of all other persons similarly situated. Plaintiffs' class is comprised of all persons who presently reside in Meyler Park Apartments or who may reside there in the future and who pay or will pay more than twenty-five to thirty per cent (25%-30%) of their "adjusted family income" for rent. The requirements of Rule 23 are met in that: the number of persons in this

class is so numerous as to make joinder impossible; there are questions of law and fact common to the class in that the Federal Defendants illegally approved a rent increase for the class of Plaintiffs, by failing to enforce duly adopted rules and regulations in approving said increase and refusing to implement the operating subsidy contrary to the statute and Congressional intent and illegally granted private Defendants permission to enforce such rent increases, as of September 1, 1975; the claims of the named Plaintiffs are typical of the class; the named Plaintiffs will fairly and adequately protect the interests of the class; and all Defendants have acted on grounds generally applicable to the class in that private Defendants, without formally applying for an operating subsidy requested, received approval of, and notified all Plaintiffs of the rent increase effective September 1, 1975; (such rent increase has been cancelled for sixty (60) days upon stipulation of Plaintiffs and private Defendants), and federal Defendants approved said increase contrary to duly adopted rules and regulations and without implementing the operating subsidy, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

## V.

## *DEFENDANTS*

7. Defendant CARLA A. HILLS is sued in her official capacity as Secretary of the Department of Housing and Urban Development. 12 U.S.C. § 1702. She has overall responsibility for the administration and enforcement of all laws, regulations, powers and duties pertaining to the operation of the Department of Housing and Urban Development (hereinafter HUD). In particular, Defendant HILLS is responsible for the administration of Section 236 of the National Housing Act, 12 U.S.C. § 1701 *et seq.*

8. Defendant H. R. CRAWFORD is sued in his official capacity as the Assistant Secretary for Housing Management for HUD. He is responsible for the man-

agement of housing projects constructed under the National Housing Act and under authority delegated to him by the Defendant HILLS. In particular, he is responsible for the administration and enforcement of the management of the Section 236 Housing Program.

9. Defendant ROLAND CANFIELD is sued in his official capacity as the Area Director of the Los Angeles Area Office of HUD. He is responsible for administering and enforcing in Southern California the Section 236 Program, and all laws, regulations, and procedures applicable thereto.

10. Defendant G & K MANAGEMENT COMPANY, INC., is a corporation doing business in California whose principal office is located in Los Angeles, California, and which operates the Meyler Park Apartments, a 99-unit Section 236 development in San Pedro, California.

11. Defendant MEYLER PARK APARTMENTS is a limited partnership doing business in California whose principal office is located in Los Angeles, California, and which owns the Meyler Park Apartments, a ninety-nine (99) unit Section 236 federally-subsidized housing project for lower income families located at 860 West 5th Street, San Pedro, California.

## VI

## *BACKGROUND*

12. The Section 236 housing program was created as part of the Housing and Urban Development Act of 1968, amending the National Housing Act, 12 U.S.C. § 1701 *et seq.* The stated objective of these amendments was a reaffirmation of the goal of a "decent home and suitable living environment for every American family." To achieve this goal, Congress designed programs "to assist families with incomes so low that they could not otherwise decently house themselves." 12 U.S.C. § 1701t. In particular, the Section 236 Program was designed "for the purpose of reducing rentals for lower income families." 12 U.S.C. § 1715z-1(a).

13. Section 236 authorizes the Secretary of HUD to make periodic interest reduction payments on behalf of qualified mortgagors not to exceed the sum necessary to reduce the effective interest payments on the mortgage to one percent (1%) per annum. The savings realized by this subsidy is passed on to the tenants in the form of reduced rental payments. 12 U.S.C. § 1715z-1(f).

14. Qualified tenants pay no more than twenty-five percent (25%) of their "adjusted monthly income" for rent, but must pay at least "basic rent" which is determined on the basis of a mortgage amortized at a one per cent (1%) interest rate and no more than "fair market rent" which is based upon a mortgage amortized at existing interest rates.

15. As a condition for receiving the benefits of the Section 236 Program, project owners agree to be regulated with respect to rents, rent increase procedures (24 C.F.R. § 401.1), rate of return and methods of operation (24 C.F.R. §§ 236.1, 425.3) including tenant eligibility (24 C.F.R. §§ 236.65, 236.72, 425.19, 425.21, 425.22) and leases (24 C.F.R. §§ 236.75, 425.23) and the definition of tenants' "adjusted monthly income" (24 C.F.R. § 236.2) in a manner satisfactory to the Secretary of HUD.

16. The federal Defendants are responsible for the implementation of the Section 236 Program. As such, they publish and implement rules and regulations affecting the private Defendants, and have executed a Regulatory Agreement with Defendant Meyler Park Apartments, Ltd., and made interest-reduction payments to a mortgagee on behalf of private Defendant Meyler Park Apartments, Ltd., in accordance with such agreement.

17. Meyler Park Apartments, a 99-unit lower-income housing project located in San Pedro, City of Los Angeles, California, was constructed and financed pursuant to Section 236 of the National Housing Act (12 U.S.C. § 1715z-1 *et seq.*).

18. Maximum rents for Section 236 projects are established and approved by the federal Defendants (24 C.F.R. §§ 236.55, 425.15). The Form Regulatory Agreement (Exhibit D) which is signed by the project owner and HUD states and provides in pertinent part that:

4. The owners covenant and agree that:

. . . .

(b) The rental charged for each unit which will include all utilities except telephone, will be equal to 25% of the tenants' income or the basic rental, whichever is greater, but in no event shall rental charged exceed the fair market rental.

. . . .

(h) They shall require all tenants who do not pay the fair market value to execute a lease in the form prescribed by the Commissioner, and shall not rent any unit in the project for less than 30 days nor more than one year.

. . . .

(j) No change shall be made in the basic rental or fair market rental unless approved by the Commissioner.

19. The approved form HUD Lease (Exhibit E) for all Section 236 tenants provides in pertinent part that:

WHEREAS, pursuant to a Regulatory Agreement between the LANDLORD and the Secretary, the LANDLORD has established a basic rent schedule and a fair market rental schedule for each unit in the project, which schedules have been approved by the Commissioner; and, . . . .

. . . .

WHEREAS, the LANDLORD has determined that the TENANT is eligible to pay less than the fair market rental;

NOW, THEREFORE,

. . . .

2. The monthly rental, stipulated herein, shall include the costs of all hot and cold water, janitor service, electric current, gas and heat (all of which utilities LANDLORD covenants and agrees to furnish to the TENANT at reasonable times and in rea-

sonable amounts). LANDLORD shall not collect any charges for such utilities in addition to the monthly rental.

An addendum added to Plaintiff's leases by Defendant G & K provides in pertinent part that:

> 4. Notwithstanding any other provision hereof, should the Department of Housing and Urban Development approve a rental increase for the subject property, upon the giving of a thirty (30) day notice thereof to Lessee, Lessee's rental will be increased to the amount approved by the Department of Housing and Urban Development. However, should the rental increase equal or exceed twenty-five per cent (25%) of Lessee's present rental, Lessee may terminate this lease and vacate possession of subject property with no further obligations beyond the date Lessee surrenders possession. (Exhibit F)

20. To increase rents, project owners must comply with regulations designed to protect the tenant from arbitrary actions by either HUD or the project owner. 24 C.F.R. 401; amended by *Fed. Reg.*, Vol. 40 (No. 133, p. 29073, July 10, 1975). The rules and regulations adopted by HUD for substantively evaluating the rent increase request in pertinent part, provides that:

> 3. With the approval of HUD, a schedule of shelter rents must be established initially and maintained thereafter at levels that will provide *reasonable charges to tenants* and a fair return to the mortgager. As a general rule, the objective in examining and approving a request for an increase in rent is to compensate for *demonstrated increases* in operating expenses and taxes and thus afford the prospect of a rate of return to the owner not in excess of the rate initially allowed.
>
> . . . .
>
> c(3)(b)*1* Except for those cases where a rental schedule was aproved for rents below maximum permissible rates, the only justification for a

rent increase in a *bona fide increase* in operating expenses or real estate taxes

*Insured Project Servicing Handbook*, 4350.1 Ch 4, §3 Para 3, p. 1 and 4 (Exhibit G) (Emphasis added)

21. On August 22, 1974, the Housing and Community Development Act of 1974 became law. Section 212(2)(3) and (3)(g) of that Act (the operating subsidy provision) amended the Section 236 program and provided as follows:

. . . .

(2)(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make and contract to make additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Sec-

retary finds that the increase in the cost of utilities or local property taxes is reasonable and is comparable to cost increases affecting other rental projects in the community.
12 U.S.C. § 1715z-1(f)(3)

. . . .

(3)(g) The project shall, as required by the Sec. retary accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of sub-section (f). During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f), the initial operating expense level for any project assisted under a contract entered into prior to the date of enactment of the Housing and Community Development Act of 1974 shall be established not later than 180 days after the date of enactment of such Act.
12 U.S.C. § 1715z-1 (g)

22. Funds for the implementation of this provision were appropriated on September 6, 1974 (Pub.L. 93-414, U.S. Code Cong. Admin. News, 93d Cong., 2d Sess., Vol. 1, p. 1256). Upon information and belief, all the available funds have not been spent or obligated. The reserve

fund referred to in Section 212 (3) upon information and belief is available to federal Defendants for use as an operating subsidy and is currently valued at more than thirty-million dollars ($30,000,000.00).

## VII.

## *FIRST CAUSE OF ACTION*

23. Plaintiffs reallege and incorporate by reference each and every allegation contained in Paragraphs 1 through 22 as if fully set forth herein.

24. Plaintiffs and members of their class are lower income families within the meaning of Title 12 U.S.C. § 1715z-1. As such, they rent units in Meyler Park Apartments from the private Defendants at an amount less than the fair market value of their units, presently at $116.00 per month, which is an amount greater than twenty-five or thirty percent (25-30%) of their gross incomes.

25. More particularly, private Defendants approved Plaintiffs on the basis of their incomes as eligible tenants and entered into lease agreements with them, which agreements are in effect at present and are automatically renewable unless terminated for good cause by thirty (30) days notice by private Defendants, or by 30 days notice by Plaintiffs.

26. Under the terms of these lease agreements, Plaintiffs pay rent at the rate less than the established fair market rental. Plaintiffs are informed and believe, and on that basis allege, that the difference between the amount of rent Plaintiffs pay and the fair market value of their units when spread over the life of the mortgage represents a value to each Plaintiff exceeding ten thousand ($10,000.00) dollars, exclusive of interest and costs.

27. Plaintiffs Hilda Abrams, Greta Jaeger, and Margaret McEachin signed original leases in 1972 or 1973 to pay rent at the rate of $105.32 per month. Plaintiff's leases were first amended effective November 1, 1974, to increase the rent 10.8% to $116.00 per month.

Said rent raise was attributed at least in part to increased utility costs and property taxes (Exhibit H).

28. On or about May 29, 1975, private Defendants, pursuant to HUD regulations (24 C.F.R. § 401), notified Plaintiffs of their intention to apply to HUD for approval of a second rent increase. The rent increase was requested, at least in part, because of a dramatic increase in utility costs and an increase in property taxes. (Exhibit I).

29. On or about July 1, 1975, private Defendants submitted to federal Defendants the request for a rent increase. This request was approved by federal Defendants because of the increased costs for all utilities, property taxes, and other operations costs. (Exhibit J).

30. On or about July 28, 1975, Plaintiffs were notified that the rent increase had been approved by the federal Defendants and that effective September 1, 1975, their rents would be increased by 10.4%, to $128.00 per month. (See Exhibit K).

31. Plaintiffs, through their attorney Ronald S. Javor, requested private Defendants to postpone the rent increase and apply to federal Defendants for an operating subsidy to cover the increases in property taxes and utilities. (See Exhibit L). The granting of the operating subsidy would make the proposed rent increase unnecessary.

32. On September 2, 1975, Plaintiffs and Defendant G & K Management Company, Inc., entered into the following agreement:

AGREEMENT

between

G & K MANAGEMENT CO., INC.

and

LEGAL AID FOUNDATION OF LONG BEACH

It is hereby stipulated by and between G & K MANAGEMENT CO., INC. and RONALD S. JAVOR, Attorney at Law, on behalf of those certain residents of MEYLER PARK APARTMENTS who would, if the pro-

posed $12.00 rental increase were to take effect as scheduled, be paying an amount in excess of Thirty Per Cent (30%) of their Adjusted Family Income, that:

(1) G & K MANAGEMENT CO., INC. hereby agrees to send forthwith to current residents of MEYLER PARK APARTMENTS a notice of the cancellation of the proposed Security Deposit increase of $12.00, said cancellation to be effective for a period of one year commencing on September 1, 1975 and ending on August 31, 1976.

(2) G & K MANAGEMENT CO., INC. hereby agrees to voluntarily rescind for a period not to exceed sixty (60) days, beginning September 1, 1975 and ending October 31, 1975, the proposed rental increase of $12.00 with respect to those residents of the MEYLER PARK APARTMENTS who, by virtue of said rental increase, would thereafter be paying a total rental in an amount in excess of Thirty Per Cent (30%) of their Adjusted Family Income (defined as Ninety-Five Per Cent (95%) of Gross Income).

(3) After the expiration of the sixty (60) day period referred to hereinabove, if the UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT is neither making nor has been ordered to make Additional Assistance Payments to MEYLER PARK APARTMENTS, A LIMITED PARTNERSHIP, pursuant to Section 212 of the Housing and Community development Act of 1974, G & K MANAGEMENT CO., INC, and/or the residents of MEYLER PARK APARTMENTS (represented by MR. JAVOR) shall have the right to take whatsoever action as they may deem necessary in the circumstances to preserve and maintain their respective positions with regard to the proposed rental increase, including, but not limited to, an application to a court of competent jurisdiction for appropriate relief.

This agreement shall in no way prejudice or otherwise be construed in such a way so as to constitute a waiver of an right, duty, or obligation of either party hereto with respect to the matter of the Residents of MEYLER PARK APARTMENTS, et al versus H.U.D.

THE LEGAL AID FOUNDATION
OF LONG BEACH

_____

BY: _____
RONALD S. JAVOR
Attorney at Law

DATE: _____

G & K MANAGEMENT CO., INC.

_____

BY: _____
SHERMAN GARDNER
President

DATE: August 28, 1975

EXHIBIT M

33. Unless restrained by this Court, private Defendants will attempt to increase Plaintiffs' rents as of November 1, 1975, resulting in grave hardship to the Plaintiffs and threat of eviction due to their inability to pay the increased rent. The increase will go into effect without affording Plaintiffs their rights to receive the benefits of the operating subsidy, which mandates that additional assistance payments must be made to qualified Section 236 project owners on behalf of tenants whose rents have increased as a result of increases in property taxes and utilities.

34. The lack of opportunity to receive the benefits of the operating subsidy will cause Plaintiffs and all those similarly situated great and irreparable injury.

## VIII.

## *SECOND CAUSE OF ACTION*

35. Plaintiffs reallege and incorporate by reference each and every allegation contained in Paragraphs 1 through 22 as if fully set forth herein.

36. The language of Section 212 of the Housing and Community Development Act of 1974 (the operating subsidy provision) authorizing federal Defendants to establish within 180 days, by February 18, 1975, an initial operating expense level for each Section 236 project and to make payments to project owners for cost of utilities and local property taxes in excess of the initial operating expense level in amounts not to exceed an amount required to maintain rentals at levels not in excess of twenty-five to thirty percent (25-30%) of the tenant's income is a clear statement of mandatory duty. The thirty million dollar ($30,000,000.00) reserve fund must be used to satisfy the need for operating subsidies before alternative uses may be considered. Thus, the duty to implement Section 212 is a ministerial duty.

37. The federal Defendants have not established an initial operating expense level for Meyler Park Apartments. Although federal Defendants have a mandatory duty to establish the operating expense level by Febru-

ary 18, 1975, they have made no attempt to comply with the statute.

38. The federal Defendants neither issued rules and regulations implementing the operating subsidy provision nor have they made additional payments available to private Defendants, in accordance with the operating subsidy provision, to cover increases in property taxes and utilities which result in a rent in excess of twenty-five to thirty percent (25-30%) of the Plaintiffs' "adjusted monthly incomes."

39. Upon information and belief, federal Defendants are considering utilizing the reserve fund for purposes other than the implementation of the operating subsidy (Exhibit N).

40. Despite the fact that the federal Defendants have openly admitted that they will not implement the operating subsidy provision, Plaintiffs, through their attorney, Ronald Javor, have requested federal Defendants to implement the operating subsidy, to establish an operating expense level for Meyler Park Apartments, to make additional assistance payments to private Defendants for any increases in property taxes and utilities which result in a rental in excess of twenty-five to thirty percent (25-30%) of Plaintiffs' incomes and to rescind the approved rent increase until there has been compliance with the operating subsidy provision. (Exhibits N and O).

41. By failing to implement the operating subsidy provision and approving a rent increase, federal Defendants are denying Plaintiffs their legal benefits and will cause them to suffer irreparable harm. By failing and refusing to implement the operating subsidy, federal Defendants have violated their * * * under that section and have deprived Plaintiffs of rights conferred by that section.

42. If it were not for the agreement entered into between Plaintiffs and Defendant G & K Management Company, Inc., Plaintiffs, as a direct result of the federal Defendants' actions, would be obligated to pay an additional $12.00 per month in rent as of September 1, 1975. Plaintiffs are currently paying $116.00 per month for rent which is more than twenty-five percent (25%) of their "adjusted monthly incomes." Upon information

and belief, at a minimum, $12.00 of the proposed $128.00 rental is attributable to increases in property taxes and utilities and thus the entire rental increase should be supplemented by the operating subsidy. Plaintiffs will be harmed if the $12.00 rental increase is assessed against them, and will continue to be harmed, since they are currently forced to pay more than they should and more than they can afford without sacrificing other necessities in order to secure decent, safe, and sanitary housing.

## IX.

## *THIRD CAUSE OF ACTION*

43. Plaintiffs reallege and incorporate by reference herein each and every allegation contained in Paragraphs 1 through 22 as if fully set forth herein.

44. On or about July 1, 1975, federal Defendants received an application for approval of a rent increase from private Defendants. Private Defendants made the request alleging, *inter alia*, that increases in property taxes and utilities necessitated such an increase. On or about July 28, 1975, federal Defendants approved the request for a rent increase in violation of the purposes and intent of the Section 236 housing program and their duly promulgated rules and regulations.

45. The Section 236 housing program is designed to provide decent, safe, and sanitary housing at reduced rentals for lower income families. 12 U.S.C. §§ 1701t and 1715z-1(a). In accordance with this statutory mandate, federal Defendants issued regulations requiring that rents in Section 236 projects be maintained at levels which will provide reasonable charges to tenants and a reasonable rate of return to the project owner. Requested increases are granted only for demonstrated increases in operating expenses, including utilities and property taxes, or for *bona fide* increases in operating expenses, including utilities and property taxes. See *Insured Project Servicing Handbook*, 4350.1 Ch. 4, § 3. (Exhibit G). Implicit in the HUD standard of review is a showing by the project owner that income from sources other

than tenants' rentals have been maximized for the project for which the rental increase was requested.

46. Private Defendants are eligible for an operating subsidy. There have been increases in operating expenses due to increases in property taxes and utilities for Meyler Park Apartments since the project was fully occupied and the tenants pay more than twenty-five to thirty percent (25-30%) of their "adjusted monthly incomes" for rent.

47. Since private Defendants are eligible for an operating subsidy, private Defendants' failure to formally apply for the operating subsidy and federal Defendants' failure to require such application prior to the approval of the requested rent increase is contrary to the purposes and intent of the National Housing Act and the rules and regulations promulgated pursuant thereto. Thus the approval of the rent increase must be rescinded until the federal Defendants and private Defendants have complied with the duly promulgated regulations by exhausting all other sources of income and subsidies for the project.

48. No statute prohibits judicial review of federal Defendants' failure and refusal to implement the operating subsidy provision, nor is the matter committed to agency discretion by law.

49. No further action or inaction by federal Defendants will clarify or make more concrete the issues presented in this action. Judicial review in this case will not interrupt any administrative proceeding.

## X.

## *ACTUAL AND PRESENT CONTROVERSY*

50. There exists between Plaintiffs and Defendants an actual and present controversy, in that private Defendants have been authorized by federal Defendants to implement and will implement an illegal rent increase for the Plaintiffs. Private Defendants have failed to formally apply for an operating subsidy. The federal Defendants approved an illegal rent increase and refuse

to implement the operating subsidy provision and rescind the rent increase pending a determination of eligibility for the operating subsidy, thus denying Plaintiffs their statutory benefits. Plaintiffs assert that such action is illegal and contrary to the purposes and intent of the National Housing Act as amended by the Housing and Community Development Act of 1974.

## XI.

## *IRREPARABLE INJURY*

51. Plaintiffs will suffer severe and irreparable injury as a result of private Defendants' and federal Defendants' actions to enforce the illegal rent increase unless enjoined by this Court during the prosecution of this litigation and permanently from implementing the rent increase without complying with the duly promulgated rules and regulations and before the operating subsidy has been implemented.

52. The federal Defendants' actions of approving the rent increase of 10.4% in July, 1975, contrary to duly adopted rules and regulations and failing to implement the operating subsidy provision will cause immediate and irreparable harm to the Plaintiffs. Since Plaintiffs are currently eligible to receive the benefits of the operating subsidy, federal Defendants' failure to implement the operating subsidy provision as of February 22, 1975, has caused and will continue to cause immediate and irreparable harm to the Plaintiffs.

## XII.

## *NO ADEQUATE REMEDY AT LAW*

53. Plaintiffs have no adequate remedy at law. A money judgment cannot compensate Plaintiffs, who must, to avoid eviction, stretch inadequate incomes and sacrifice other necessities in order to make rental payments which they are not statutorily obligated to make.

## XIII.

### *PRAYER FOR RELIEF*

WHEREFORE, Plaintiffs, on behalf of themselves and the class they represent, pray this Court to:

1. Enter judgment declaring this to be a class action.
2. Enter judgment declaring that the approval of the rent increase of $12.00 is illegal for failure of the federal Defendants and private Defendants to comply with the National Housing Act and rules and regulations promulgated pursuant thereto pertaining to the application for and approval of rent increase requests.
3. Enter judgment declaring that the approval of the rent increase of $12.00 is illegal for failure of the private Defendants to formally apply for and federal Defendants to implement the operating subsidy provision of the Housing and Community Development Act of 1974.
4. Enter judgment declaring that federal Defendants and private Defendants must comply with the purposes and intent of the National Housing Act and the rules and regulations issued pursuant thereto that pertain to applications for and approval of rent increase requests.
5. Enter judgment declaring that federal Defendants must implement the operating subsidy provision of the Housing and Community Development Act of 1974 and that private Defendants must apply for the operating subsidy.
6. Enter judgment declaring that federal Defendants must make operating subsidy payments and continue to make such payments retroactive to February 18, 1975 to private Defendants to offset costs attributable to increases in property taxes and utility costs above the initial operating expense level which have created a rental equal to more than twenty-five to thirty percent (25-30%) of Plaintiffs' "adjusted monthly incomes."
7. Enter judgment mandating federal Defendants to comply with the purpose and intent of the National Housing Act and with existing rules and regulations promulgated thereto pertaining to the request for and approval of a rent increase for Meyler Park Apartments.

8. Enter judgment mandating federal Defendants to implement the operating subsidy provision of the Housing and Community Development Act of 1974.

9. Enter judgment mandating federal Defendants to make operating subsidy payments retroactive to February 18, 1975, and to continue to make such payments to the private Defendants to offset costs attributable to increases in property taxes and utility costs above the initial operating expense level which have created a rental equal to more than twenty-five to thirty percent (25-30%) of Plaintiffs' "adjusted family incomes."

10. Enter a temporary, preliminary, and permanent injunction ordering federal Defendants to rescind the approved rent increase and enjoining federal Defendants from approving or enforcing said rent increase until there has been compliance with the purposes and intent of the National Housing Act and the rules and regulations promulgated pursuant thereto pertaining to application for and approval of rent increase requests and until the operating subsidy provision of the Housing and Community Development Act of 1974 has been implemented.

11. Enter a temporary, preliminary, and permanent injunction enjoining the federal Defendants from making any payments from the Section 212(3) reserve fund for purposes other than implementation of the operating subsidy.

12. Enter a preliminary and permanent injunction enjoining private Defendants, their agents, successors, employees, attorneys, and those acting in concert with them, from enforcing the rent increase, from collecting or seeking to collect from Plaintiffs an increase in rents or from evicting or seeking to evict Plaintiffs or their class for failing to pay any rent increase until there has been compliance with existing rules and regulations and until the operating subsidy provided for by the Housing and Community Development Act of 1974 has been applied for and all benefits due the Plaintiffs and their class have been exhausted.

13. Grant such other and further relief as the Court may deem just and proper, including costs and attorneys fees.

DATED: September 3, 1975

By: /s/ Catherine M. Bishop
CATHERINE M. BISHOP

By: /s/ Ronald S. Javor
RONALD S. JAVOR

## EXHIBIT A

## AFFIDAVIT OF HILDA ABRAMS

STATE OF CALIFORNIA )
) ss
COUNTY OF LOS ANGELES )

HILDA ABRAMS, being duly sworn, deposes and says:

I am a resident of the Meyler Park Apartments, 860 West 5th Street, San Pedro, California, in Apartment 106. I have lived here for approximately 3 years.

I am 78 years old, and receive approximately $240.00 per month from Social Security. In addition, I receive approximately $53 per month from a savings account and a trust deed, and have a long-term savings account from which I receive no monthly interest until accrued.

I have been notified that my rent will be raised to $128.00 per month, effective September 1, 1975, a raise of $12.00 per month. Because of my limited income, and the rising cost of living, this additional rent will be difficult for me, and I may have to use money set aside for other necessities to pay it.

/s/ Hilda Abrams
HILDA ABRAMS

Subscribed and sworn to before me this 25th day of August, 1975

/s/ Erma L. Johnson
ERMA JOHNSON
Notary Public in and for said County and State

[OFFICIAL SEAL]

ERMA L. JOHNSON
Notary Public—California
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires July 18, 1979

EXHIBIT B

## AFFIDAVIT OF GRETA JAEGER

STATE OF CALIFORNIA )
) SS
COUNTY OF LOS ANGELES )

GRETA JAEGER, being duly sworn, deposes and says:

I am a resident of the Meyler Park Apartments, 860 West 5th Street, San Pedro, California, in Apartment 118. I have lived here for approximately three years.

I am 70 years old and receive approximately $273.00 per month from Social Security. In addition, I receive approximately $65.00 per month from interest-bearing savings accounts.

I have been notified that my rent will be raised to $128.00 per month, effective September 1, 1975, a raise of $12.00 per month. Because of our limited income, and the rising cost of living, this additional rent will be a burden on me, and I may have to use money set aside for other necessities to pay it.

/s/ Greta Jaeger
GRETA JAEGER

Subscribed and sworn to before me this 25th day of August, 1975

/s/ Erma L. Johnson
ERMA JOHNSON
Notary Public in and for said County and State

[OFFICIAL SEAL]

ERMA L. JOHNSON
Notary Public—California
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires July 18, 1979

EXHIBIT C

## AFFIDAVIT OF MARGARET MC EACHIN

STATE OF CALIFORNIA )
) SS
COUNTY OF LOS ANGELES )

MARGARET MC EACHIN, being duly sworn, deposes and says:

I am a resident of the Meyler Park Apartments, 860 West 5th Street, San Pedro, California, in Apartment 117. I have lived here for approximately three years.

I am 74 years old, and receive approximately $273 per month from Social Security, and $84.00 per month from a pension. When there is work available, I also attempt to work part-time at the local college.

I have been notified that my rent will be raised to $128.00 per month, effective September 1, 1975, a rise of $12.00 per month. Because of my limited income, and the rising cost of living, this additional rent will be a burden for me, and I may have to use money set aside for other necessities to pay it.

/s/ Margaret Mc Eachin
MARGARET MC EACHIN

Subscribed and sworn to before me this 25th day of August, 1975

/s/ Erma L. Johnson
ERMA JOHNSON
Notary Public in and for said County and State

[OFFICIAL SEAL]

ERMA L. JOHNSON
Notary Public—California
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY

My Commission Expires July 18, 1979

EXHIBIT H

[SEAL]

G & K

*Management Co., Inc.*

425 S. Fairfax Ave., Suite 201
Los Angeles, Ca. 90036

September 27, 1974

Dear Resident:

Due to the increased costs of operation, including such items as maintenance, utility costs, and property taxes, it will be necessary for us to impose a slight rental increase on all apartments at Meyler Park Apartments.

As of November 1, 1974, the rental schedule will be as follows:

| | |
|---|---|
| One-bedroom apartments | from $116.00 |

We will also require, with the payment of your November rent, the following sum, which will be applied to your present security deposit:

| | |
|---|---|
| One-bedroom apartments | $10.68 |

We trust you will understand and appreciate our position in this matter, as it is our sole objective to provide you with an atmosphere of comfort and safety that you will be proud to call your home.
Thank you.

Very truly yours,

/s/ Sherman Gardner
SHERMAN GARDNER
President

jp

EXHIBIT K

[SEAL]

G & K

*Management Co., Inc.*

425 S. Fairfax, Suite 201
Los Angeles, Ca. 90036

July 29, 1975

Dear Resident:

Due to the increased costs of operation, including such items as maintenance, utility costs, and property taxes, it will be necessary for us to impose a slight rental increase on all apartments at Meyler Park Apartments.

As of September 1, 1975 the rental schedule will be as follows:

| | |
|---|---|
| One bedroom apartments | from $128.00 |

We will also require, with the payment of your September rent, the following sum, which will be applied to your present security deposit:

| | |
|---|---|
| One bedroom apartments | $12.00 |

We trust you will understand and appreciate our position in this matter, as it is our sole objective to provide you with an atmosphere of comfort and safety that you will be proud to call your home.

Thank you.

Very truly yours,

/s/ Sherman Gardner
SHERMAN GARDNER
President

jp

EXHIBIT L

LAW OFFICES OF

LEGAL AID FOUNDATION OF LONG BEACH

HARBOR AREA OFFICE
363 W. Sixth Street
San Pedro, California 90731—831-0355

August 12, 1975

Mr. Sherman Gardner
G & K Management Co., Inc.
425 S. Fairfax, Suite 302
Los Angeles, CA 90036

IN REPLY PLEASE REFER TO:

RE: Meyler Park Apartments

Dear Mr. Gardner:

As a result of our discussion last week, and as a result of reviewing your expenses for utilities and property taxes over the past three years, and the amount allowed by HUD for the coming year, it appears that the entire amount of the proposed raise—$12.00 per month—is equivalent to the amount the aforesaid costs have risen since the project opened. In addition, in your letter to me of June 20, 1975, you pointed out that you are concerned that gas company rates have increased 60%, adding, "Since we carry the responsibility for the utilities, rising property taxes, etc., we are no longer able to sustain the complex at the present rent structure."

In the same letter, you stated that the rent raise was also necessitated because "we exhausted all alternatives before a rent raise was proposed." Since that time, in several telephone conversations, and during our meeting on July 31, 1975, I have explained to you that at least one other source of subsidy is available, particularly because of your emphasis of need being on rising utility costs and property taxes: that being the operating sub-

sidy authorization through HUD as delineated in the Housing and Community Development Act of 1974, Section 212(f)(3) and (g) (12 U.S.C. 1715 z-1(f)(3) and (g). I was quite sure that, by the time I left your office, that you understood the program and its relevance to the Meyler Park situation.

Therefore, since you have not seen fit to pursue this remedy, and possibly prevent rent defaults and evictions among the senior citizens at Meyler Park, on behalf of those tenants, I respectfully request that you postpone the proposed rent increase while you exhaust this additional remedy. You have often proclaimed your concern for the good and welfare of these residents and I believe that this is an appropriate time to demonstrate that concern.

As I have also previously explained, as a representative of the tenants, I stand ready to assist you in any way necessary to facilitate your application for operating subsidy funds, and, correspondingly, ask your good faith in taking the interests of the tenants to heart and placing a moratorium on the rent raise while seeking the subsidization which you and the tenants have a right to.

I will look forward to hearing your response to this request.

Very truly yours,

/s/ Ronald S. Javor
RONALD S. JAVOR
Attorney at Law

cc: Irving Kaplan,
HUD Loan Management Branch
Meyler Park Tenants Association.

EXHIBIT O

LAW OFFICES OF

LEGAL AID FOUNDATION OF LONG BEACH

HARBOR AREA OFFICE
363 W. Sixth Street
San Pedro, California 90731—831-0355

August 12, 1975

Mr. Irving Kaplan
Director, Loan Management Branch
Department of Housing and Urban Development
2500 Wilshire Blvd.
Los Angeles, CA 90057

IN REPLY PLEASE REFER TO:

RE: Meyler Park Apartments
Proj. No. 122-44537-LDP

Dear Mr. Kaplan:

On behalf of the residents of the Meyler Park Apartments, I am requesting that you rescind the approval by your department of the rent raise requested by G & K Management Co., Inc., to be implemented September 1, 1975. This request is made on the grounds that your letter to G & K Management Co. of July 28, 1975, attributes at least part of the raise justification to "demonstrated increases in" utilities and property taxes.

It has been apparent from my past conversations with you and others in your office that although you are aware of the congressional mandate in the Housing and Community Development Act of 1974, Section 212(f)(3) and (g) to initiate a procedure to allocate operating subsidies to buildings suffering from utility and property tax increases, no attempt has been made by your office to initiate said subsidies. In fact, as was pointed out to me, even though it is clear that the Act requires, by February 22, 1975, that initial operating expenses for each project be itemized, no steps have been taken to do so.

I have requested from Mr. Gardner of G & K Management Co. that he delay the rent raise until such time as your office initiates the operating subsidy procedure; from my past conversations with him, I doubt if this is a viable request. Therefore, it is imperative that your office rescind the previously-given approval of the rent raise for such a time as is necessary to determine an initial operating budget for that building, and subsequently establish and facilitate a procedure by which Meyler Park may reap the benefits of the operating subsidy.

Inaction on your part at this time of need for the 98 senior citizen families living at Meyler Park may well result in evictions of those unable to pay the rent increase. Your prompt response to this request would be greatly appreciated.

Very truly yours,

/s/ Ronald S. Javor
RONALD S. JAVOR
Attorney at Law

Enc:

cc: G & K Management Co., Inc.
Ms. Carla A. Hills, Secretary,
U.S. Department of Housing and Urban Development
Mr. H. R. Crawford, Assistant Secretary,
U.S. Department of Housing and Urban Development
Meyler Park Tenants Association.

AXELRAD, SEVILLA AND ROSS
10203 Santa Monica Boulevard
Los Angeles, California 90067
879-1444
Attorneys for Defendants
G & K Management Co., Inc.
and Meyler Park Apartments,
a Limited Partnership

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. CV 75-3009 JWC

[Filed Sep. 24, '75, 2:45 PM—Ch—Jn]

HILDA ABRAMS, GRETA JAEGER, MARGARET MC EACHIN, Individually, and as representatives of a class, PLAINTIFFS

*vs.*

CARLA HILLS, as Secretary of the U.S. Department of Housing and Urban Development, H. R. CRAWFORD, as Assistant Secretary for Housing Management of the U.S. Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the U.S. Department of Housing and Urban Development, and G & K MANAGEMENT CO., INC., and MEYLER PARK APARTMENTS, a Limited Partnership, DEFENDANTS

ANSWER OF DEFENDANTS G & K MANAGEMENT CO., INC. and MEYLER PARK APARTMENTS, A Limited Partnership TO COMPLAINT

Defendants G & K Management Co., Inc. and Meyler Park Apartments, a Limited Partnership, for themselves alone, answer the complaint herein as follows:

1. Defendants admit each and every allegation contained in the following paragraphs of the complaint: 1 through 46, inclusive, 48 and 49; 51 through 53, inclusive.

2. Answering paragraph 47, defendants admit that "private Defendants are eligible for an operating subsidy" and except as herein expressly admitted, deny each and every remaining allegation contained in said para-

graph. Defendants allege that on or about August 11, 1975, they applied in writing to the federal Defendants for an operating subsidy, and that a true copy of said written application is attached hereto as Exhibit A. Defendants further allege upon information and belief, that the federal Defendants have not promulgated regulations providing for formal application for an operating subsidy.

3. Answering paragraph 50, defendants admit that "there exists between Plaintiffs and Defendants an actual and present controversy" and that the federal Defendants "refuse to implement the operating subsidy provisions" and except as herein expressly admitted deny each and every remaining allegation contained in said paragraph.

WHEREFORE, defendants pray for judgment as follows:

1. That the court declare that the approval by the federal defendants of the rent increase of $12.00 per month is lawful with respect to those of the private defendants' tenants whose rent, as adjusted by said increase, remains less than 30% of their adjusted family income.

2. That the court issue an injunction ordering the federal defendants to implement procedures for determining the private defendants' eligibility for the operating subsidy provided for by the Housing and Community Development Act of 1974 with respect to those of the private defendants' tenants whose rent, as adjusted by the rent increase of $12.00 per month, will be greater than 30% of their adjusted family income.

DATED: September 23, 1974.

AXELRAD, SEVILLA AND ROSS

By /s/ John G. Kerr
JOHN G. KERR
Attorneys for Defendants
G & K Management Co., Inc. and
Meyler Park Apartments, a
Limited Partnership
10203 Santa Monica Boulevard
Los Angeles, CA 90067

## MOTION TO DISMISS, OR, IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Federal defendants, by and through the undersigned, respectfully move the Court to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, on the grounds that the Complaint fails to state a claim upon which relief can be granted, and also that the Court lacks jurisdiction over the subject matter. In the alternative, said defendants move the Court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the grounds that there are no triable issues of fact and defendants are entitled to judgment as a matter of law.

These motions are based upon the pleadings, and the memorandum of points and authorities filed separately herewith, and all exhibits filed in the case.

DATED: This 31st day of October, 1975.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U.S. Attorney
Chief, Civil Division

/s/ Stephen D. Petersen
STEPHEN D. PETERSEN
Assistant U.S. Attorney

Attorneys for Federal Defendants

June 26, 1975

Mr. Sherman Gardner, President
G & K Management Co., Inc.
425 South Fairfax Avenue
Suite 201
Los Angeles, California 90036

RE: *Meyler Park Apartments*

Dear Mr. Gardner:

I appreciated the opportunity to speak with you on Tuesday, June 24, 1975, regarding your proposed rental increase for Meyler Park Apartments, and will be going up to the Apartments to see the forms which you have so generously permitted me to see. After I have an opportunity to study the Section 236 Guidelines, I will then come to your office to look over your monthly statements and/or bills, as you suggested. While I understand your desire to reap the maximum-allowed profit, I am also concerned that a number of senior citizens will be severely inconvenienced by rent raises of over 33% in one year. As a result of the initial promises by you or your agents, that rent would probably remain at a point which represented 25% of income, I believe that you have a obligation not only to maintain a reasonable rental level, but also to seek alternative sources of rent subsidization for those persons who need it.

I will look forward to speaking with you again in the near future. I hope that this matter may be resolved on amicable bases.

Very truly yours,

RONALD S. JAVOR
Attorney at Law

RSJ/mc

cc: Erving Jacobs

CATHERINE M. BISHOP
National Housing and Economic
Development Law Project
2313 Warring Street
Berkeley, California 94704
Telephone: (415) 624-2826

RONALD S. JAVOR
Legal Aid Foundation of
Long Beach
363 West Sixth Street
San Pedro, California 90731
Telephone: (213) 831-0855

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Filed Nov. 4, 1975]

Civ. No. 75 3009 JWC

# STIPULATION OF FACTS BETWEEN PLAINTIFFS AND G & K MANAGEMENT CO. AND MEYLER PARK APARTMENTS, DEFENDANTS

HILDA ABRAMS, GRETA JAEGER, MARGARET MC EACHIN, Individually, and as representatives of a class, PLAINTIFFS,

*vs.*

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, H. R. CRAWFORD, as Assistant Secretary for Housing Management of the United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the United States Department of Housing and Urban Development, and G & K MANAGEMENT CO., INC., and MEYLER PARK APARTMENTS, a Limited Partnership, DEFENDANTS.

IT IS HEREBY STIPULATED AND AGREED by and between the Plaintiffs and G & K MANAGEMENT CO., INC., and MEYLER PARK APARTMENTS, Defendants, by their respective counsel, that, for the purpose of trial or other hearings in the above-entitled cause, the facts hereinafter stated are undisputed and may be treated by the Court as facts proved in open court.

The parties may, on the trial of said cause, call witnesses and offer evidence for the purpose of proving such additional facts as the parties may see fit.

1. The Plaintiffs HILDA ABRAMS, GRETA JAEGER, and MARGARET MC EACHIN, hereinafter, "Plaintiff," are residents of the Meyler Park Apartments, each of whom pay more than twenty-five to thirty percent (25-30%) of their "adjusted family incomes" in rent.

2. The class which Plaintiffs represent are residents of the Meyler Park Apartments, each of whom pay more than twenty-five to thirty percent (25-30%) of their adjusted family incomes" in rent.

3. "Adjusted family income" is determined by the Federal Defendants CARLA HILLS, H. R. CRAWFORD, and ROLAND CANFIELD according to 24 C.F.R. 236.2 to be monthly gross income, including total income before taxes and other deductions, less five percent of monthly gross income and other deductions not listed herein.

4. Defendants CARLA HILLS, H. R. CRAWFORD, and ROLAND CANFIELD, hereinafter "Federal Defendants," are officials of the United States Department of Housing and Urban Development, hereinafter, "HUD," and are responsible for the administration and enforcement of all laws, regulations, powers, and duties relating to that Department, and particularly for the administration of Section 236 of the National Housing Act, 12 U.S.C. § 1701, *et seq.*

5. Defendants MEYLER PARK APARTMENTS, a Limited Partnership, and G & K MANAGEMENT CO., INC., hereinafter, "private Defendants," are respectively, the owner and manager of the Meyler Park Apartments, a 99-unit Section 236 development in San Pedro, California.

6. The Section 236 housing program is a part of the National Housing Act, added by the Housing and Devel-

opment Act of 1968 and designed for the purpose of reducing rentals for low-income families who cannot otherwise afford decent housing.

7. The federal Defendants are responsible for implementation of the Section 236 Program, including issuing rules and regulations pursuant thereto, making periodic interest payments on behalf of qualified mortgagors, and regulating project owners with respect to rent, rent increase procedures, and other operating procedures.

8. The National Housing Act was further amended by the Housing and Community Development Act of 1974, hereinafter, "HCDA, 1974," on August 22, 1974, adding Section 212(2) (3) and (3), hereinafter, "operating subsidy provisions," which provided that HUD was obligated to establish an initial operating expense level by February 18, 1975; that HUD was obligated to exhaust the reserve fund accumulated from rental money received in excess of basic rent standards, in payments to qualified mortgagors under the operating subsidy provisions; and that HUD was obligated to make additional assistance payments to qualified mortgagors, on behalf of appropriate tenants, to subsidize the rise in cost of utilities and property taxes, where reasonable and comparable, from the time of initial occupancy of the project.

9. The reserve fund referred to in Section 212(3) is available to federal Defendants for use as an operating subsidy and is currently valued at more than thirty million ($30,00,000) dollars.

10. Other funds for the implementation of the operating subsidy provision were appropriated on September 6, 1974, and such funds have not been entirely spent or obligated.

11. The Meyler Park Apartments is a 99-unit lower-income housing complex in San Pedro, California, constructed and financed pursuant to Section 236.

12. Qualified tenants in the Meyler Park Apartments pay no more than twenty-five (25%) percent of their "adjusted family incomes" for rent, up to "fair market value," or pay "basic rent," computed on the basis of the amortized mortgage and operating costs, and approved by Federal Defendants.

13. Applications for rent increases are submitted by the private Defendants to the Federal Defendants, and are approved if they are providing reasonable charges to tenants and a fair return to the mortgager. Such increases must be for demonstrated and bona fide increases in operating expenses and taxes, and sources of funds other than tenants' rents must be maximized.

14. Plaintiffs began their occupancy at the Meyler Park Apartments in 1972 and 1973, paying rent at the initial rate of $105.32 per month. Their leases were first amended effective November 1, 1974, to increase the rent ten and eight-tenths percent (10.8%) to $116.00 per month. Said rent raise was attributed at least in part to increased utility costs and property taxes.

15. On or about May 29, 1975, private Defendants notified Plaintiffs of their intention to apply to HUD for approval of a second rent increase, attributing said increase, at least in part, to a dramatic increase in utility costs and an increase in property taxes.

16. On or about July 1, 1975, private Defendants submitted to Federal Defendants the request for a rent increase, which was approved by the Federal Defendants because of the increased costs for all utilities, property taxes, and other operating costs.

17. On or about July 28, 1975, Plaintiffs were notified that the rent increase had been approved by the Federal Defendants and that effective September 1, 1975, their rent would be increased to $128.00 per month, a raise of ten and four-tenths percent (10.4%).

18. An increase in Plaintiffs' rent at this time of twelve ($12.00) monthly will result in grave hardship to Plaintiffs and a threat of eviction due to their inability to pay the increased rent and severe difficulty in providing themselves with the necessities of life from their disposable incomes.

19. Plaintiffs requested private Defendants to apply for additional assistance payments from the operating subsidy, and Federal Defendants to provide additional assistance payments under the operating subsidy program.

20. There have been increases in property taxes and utilities at Meyler Park Apartments since the date that

the apartment complex may be determined to be fully occupied which have increased Plaintiffs' rents by at least, if not more than, $12.00 per month, the amount of the present rent increase.

21. Pursuant to the operating subsidy provision, private Defendants are eligible to receive additional assistance payments on behalf of the Plaintiffs and the class they represent.

22. Federal Defendants have not established an initial operating expense level for the Meyler Park Apartments, neither by February 18, 1975, nor until the present.

23. The Federal Defendants have not issued rules and regulations implementing the operating subsidy provision, nor have they accepted applications for additional assistance payments.

24. Federal Defendants have not made additional assistance payments to private Defendants.

25. Contrary to the statute, the federal Defendants are no longer requiring the private Defendants, and all other Section 236 project owners, to return to the Federal Defendants all money collected as rentals in excess of basic rents.

26. Transmittal Notice 24, which amends The Insured Project Service Handbook (4350.1) issued by the federal Defendants permits the private Defendants and all other Section 236 project owners to subtract from total rents collect the basic rents and, in addition, rent collection losses.

27. As a result of the implementation of this regulation, the reserve fund from which operating subsidies must be paid is no longer accruing at the maximum rate.

28. This regulation is contrary to the HCDA, 1974, and frustrates the purposes and intent of the operating subsidy provision.

29. HUD is using the reserve fund for purposes other than the operating subsidy.

30. HUD may not use the reserve fund for purposes other than the implementation of the operating subsidy unless the reserve fund is adequate to meet the estimated additional assistance payments. If it is adequate, then such excess charges shall be credited to the appropri-

ation for interest-reduction payments for the construction of Section 236 projects.

31. Private Defendants' request for a rent increase was submitted to HUD, and the federal Defendants approved it in violation of their own rules and regulations. The requested increase was not considered in light of the applicability and the private Defendants' eligibility for the operating subsidy. Thus, while the costs justifying the rent increase attributable to increases in utility and property tax costs were reasonable and comparable, the need for such increase was not demonstrated and bona fide because federal Defendants did not consider the application for an operating subsidy for private Defendants, on behalf of Plaintiffs.

32. The matter in controversy exceeds the sum of $10,000.00 for each Plaintiff, exclusive of interest and costs, in that the difference between the amount of rent Plaintiffs pay and the fair market value of their units when spread over the life of the mortgage represents a value to each Plaintiff exceeding ten thousand dollars ($10,000.00).

DATED: October 31, 1975

/s/ Ronald S. Javor
RONALD S. JAVOR,
CATHERINE BISHOP
Attorneys for Plaintiffs

/s/ John G. Kerr
AXELRAD, SEVILLA & ROSS
BY: JOHN G. KERR
Attorneys for Defendants
MEYLER PARK APARTMENTS
G & K MANAGEMENT, CO., INC.

AXELRAD, SEVILLA AND ROSS
Suite 400, Clubview Building
10203 Santa Monica Boulevard
Los Angeles, California 90067

213 277-6620 and 879-1444

Attorneys for Defendants
G & K Management Co., Inc.
and Meyler Park Apartments,
a Limited Partnership

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Filed Nov. 7, 1975]

Civil Action No. CV 75-3009 JWC

HILDA ABRAMS, ET AL., PLAINTIFFS,

*vs.*

CARLA HILLS, ETC., ET AL., DEFENDANTS.

# AFFIDAVIT OF SHERMAN GARDNER IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

STATE OF CALIFORNIA )
) ss.
COUNTY OF LOS ANGELES)

SHERMAN GARDNER, being first duly sworn, deposes and says:

1. I am the president of G & K Management Co., Inc., one of the private defendants in this action. I make this affidavit in response to the plaintiffs' motion for summary judgment, or in the alternative, for a preliminary injunction. The following facts are within my personal knowledge and if called as a witness I am competent to testify thereto.

2. G & K Management Co., Inc. is a California corporation. Its principal office is located at 425 South Fairfax Avenue, Los Angeles, California 90036. It manages the Meyler Park Apartments, a 99-unit apartment project located in San Pedro, California. This project is owned by Meyler Park Apartments, a limited partnership, whose principal place of business is also located at 425 South Fairfax Avenue, Los Angeles, California 90036.

3. Meyler Park Apartments is a rental housing project designed for occupancy by lower income families and subsidized by the Department of Housing and Urban Development (HUD) under Section 236 of the National Housing Act, 12 USC § 1715z-1. The project is designated by the Federal Housing Administration (FHA) as Project No. 122-44537-LDP. Rentals are established and regulated pursuant to the Regulatory Agreement for Limited Distribution Mortgagors under Section 236 of the National Housing Act, as Amended (hereafter "the Regulatory Agreement"), dated December 1, 1971, between Meyler Park Apartments, a limited partnership, and the Secretary of HUD. A true copy of the Regulatory Agreement is attached hereto as Private Defendants' Exhibit One.

4. Of the 99 units in the project, 98 consist of one-bedroom apartments, and one is a two-bedroom apartment which is also the office of the resident manager and which produces no rental income. All utilities except telephone are paid directly by the Project Owner. Construction of the project was completed and the apartments authorized by the FHA for occupancy in July, 1972. Basic monthly rental per unit was initially established at $105.32. A copy of the Rental Schedule and Information on Rental Project (FHA Form 2458), dated March 27, 1972, which was submitted by the Project Owner to the FHA, is attached hereto as Private Defendants' Exhibit Two. This Rental Schedule was approved by the FHA on December 20, 1971. The fair market rental of each unit was initially established at $154.20. The project was fully occupied, allowing for a 5% vacancy factor, in October, 1972.

5. On August 7, 1974, the Project Owner applied to HUD for a rental increase of $10.68 per unit at the proj-

ect necessitated by increased utility, payroll, repairs and ground maintenance costs. This rental increase was approved by HUD on September 16, 1974. A copy of this application and of the letter authorizing this increase, together with the approved Rental Schedule, is attached hereto as Private Defendants' Exhibit Three. This rental increase was put into effect for all tenants at Meyler Park Apartments on November 1, 1974.

6. As a consequence of the November 1, 1974, rental increase, certain tenants were required to pay rent in excess of 25% of their adjusted monthly incomes, as defined in Section 236.2 of the Regulations issued by the FHA, 24 CFR § 236.2. G & K Management, Inc. is still in the process of determining the exact number of such tenants.

7. Effective August 22, 1974, Section 236 of the National Housing Act, was amended to require the Secretary of HUD to establish an initial operating expense level for the Meyler Park Apartments project not later than February 18, 1975, and to authorize the Secretary to make additional assistance payments (the "operating subsidy" referred to in the plaintiffs' complaint) to the project after that date. However, to my knowledge, the Secretary took no action to establish an initial operating expense level for the project, and has not done so as of the date of this affidavit.

8. On July 3, 1975, the Project Owner again applied to HUD for a rental increase of $15.00 per unit at the project necessitated by increases in maintenance expenses, utilities, labor repairs, real property taxes and to provide for a $3.00 per unit per month painting reserve. A copy of this application, together with the supporting documentation, is attached hereto as Private Defendants' Exhibit Four. Pursuant to this application, a rental increase of $12.00 per unit was approved by HUD on July 28, 1975. A copy of the letter authorizing such increase, together with the approved Rental Schedule, is attached hereto as Private Defendants' Exhibit Five.

9. On July 29, 1975, all tenants at Meyler Park Apartments were notified that the $12.00 per month approved rental increase would be made effective commencing Sep-

tember 1, 1975, and that an increase of $12.00 would be required in each tenant's security deposit. Certain of the tenants contacted the Legal Aid Foundation of Long Beach for the purpose of avoiding or delaying the imposition of this increase. As a result of discussions and negotiations between myself and attorney Ronald S. Javor of the Legal Aid Foundation, in early August, 1975, I contacted Mr. Irving Kaplan, Director of the Loan Management Branch of the Los Angeles office of HUD and requested additional assistance payments to the Project Owners on behalf of those tenants for whom the rental increase would result in their paying rent in excess of 25% of their adjusted monthly incomes. To my knowledge, HUD at that time had adopted no regulations providing any procedures for formal application for such funds, nor has it done so since. On August 11, 1975, I wrote to Mr. Kaplan requesting the release of funds for the project under the authority of the 1974 amendment to Section 236 of the National Housing Act. A copy of my letter setting forth this request is attached hereto as Private Defendants' Exhibit Six. Neither I nor the Project Owners ever received any response from HUD to my letter.

10. As a further result of my negotiations with Mr. Javor, on August 28, 1975, I entered into an agreement, on behalf of G & K Management Co., Inc., with the Legal Aid Foundation of Long Beach, cancelling the proposed security deposit increase for a period of one year and rescinding the proposed rental increase for a period of 60 days. The rescission of the rental increase was subsequently extended for an additional 30-day period after the commencement of this action.

11. Unquestionably, any rental increase at Meyler Park Apartments works a hardship on those tenants who, as a result of such increase, would be required to pay rent in excess of 25% of their adjusted family incomes, or else vacate their apartments in the project and attempt to find cheaper and less desirable housing elsewhere. With respect to some of the tenants in the project, I did manage to obtain rental assistance benefits for them from the City of Los Angeles Housing Authority under revised

Section 23 of the National Housing Act. The only assistance available for the remaining tenants, however, is the benefit of the operating subsidy provisions of Section 236.

12. By the same token, the rental increase, or additional assistance payments in an amount equal to the increase, is essential to the project in order to make it a viable business operation. For the fiscal year ending February 28, 1975, the project sustained a net loss of $41,831.00. The rental increase is necessary primarily because of increases in local real property taxes and utility rates over which management has absolutely no control. It is projected that such costs will inevitably increase in the future. Without the funds available under the operating subsidy provisions of Section 236, management will be unable to continue to operate the project for the class of tenants for which it was initially designed, and the whole purpose of the project will have to be abandoned.

/s/ Sherman Gardner
SHERMAN GARDNER

SUBSCRIBED AND SWORN to before me this 5th day of November, 1975.

/s/ Peggy L. Sirit [SEAL]
PEGGY L. SIRIT
Notary Public in and for
said county and state

My Commission Expires July 30, 1978

When recorded mail to:
HUD, Attn: H. Walton
2500 Wilshire Blvd.
Los Angeles, Calif.
90057

FHA FORM NO. 3136
Rev. 9/69
(Previous edition obsolete)

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION

# REGULATORY AGREEMENT FOR LIMITED DISTRIBUTION MORTGAGORS UNDER SECTION 236 OF THE NATIONAL HOUSING ACT, AS AMENDED

Project No. 122-44537-LDP

Mortgagee UNION BANK

Amount of Mortgage Note $1,497,200.00 Date December 1, 1971

Mortgage Recorded: Concurrently herewith State California County Los Angeles Date

Book Page

This Agreement entered into this 1st day of December, 1971,

between MEYLER PARK APARTMENTS, a limited partnership,

whose address is Jona Goldrich
425 South Fairfax Avenue
Los Angeles, California 90036

their successors, heirs, and assigns (jointly and severally, hereinafter referred to as Owners) and the undersigned Secretary of Housing and Urban Development and his successors, acting by and through the Federal Housing Commissioner (hereinafter called Commissioner).

In consideration of the endorsement for insurance by the Commissioner of the above described note or in consideration of the consent of the Commissioner to the transfer of the mortgaged property, and in order to comply with the requirements of Section 236 of the National Housing Act, as amended, and the Regulations adopted by the Commissioner pursuant thereto, Owners agree for themselves, their successors, heirs and assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect, and during such further period of time as the Commissioner shall be the owner, holder or reinsurer of the mortgage, or during any time the Commissioner is obligated to insure a mortgage on the mortgaged property:

1. Owners, except as limited by paragraph 17 hereof, shall promptly make all payments due under the note and mortgage; provided, however, that the Commissioner shall make payments to the mortgagee on behalf of the Owners in accordance with the interest reduction contract between the mortgagee and the Commissioner.

2. (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Commissioner of an amount equal to $ 472.09 per month unless a different date or amount is approved in writing by the Commissioner. Such fund, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements and mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the Commissioner. In the event of a default in the terms of the Mortgage, pursuant to which the loan has been accelerated, the Commissioner may apply or authorize the application of the balance in such fund to the amount due on the mortgage debt as accelerated.

(b) Where Owners are acquiring a project already subject to an insured mortgage, the reserve fund for replacements to be established will be equal to the amount due to be in such fund under existing agreements or charter provisions at the time Owners acquire such project, and payments hereunder shall begin with the first payment due on the mortgage after acquisition, unless some other method of establishing and maintaining the fund is approved or required in writing by the Commissioner.

(c) Owners shall establish and maintain, in addition to the reserve fund for replacements, a residual receipts fund by depositing thereto, with the mortgagee, the residual receipts, as defined herein, within 60 days after the end of the semiannual or annual fiscal period within which such receipts are realized. Residual receipts shall be under the control of the Commissioner, and shall be disbursed only on the direction of the Commissioner, who shall have the power and authority to direct that the residual receipts, or any part thereof, be used for such purpose as he may determine.

3. Real property covered by the mortgage and this Agreement is described in Schedule A attached hereto, consisting of one (1) page.

4. The Owners covenant and agree that:

(a) with the prior approval of the Commissioner, they will establish for each dwelling unit (1) a basic rental charge determined on the basis of operating the project with payments of principal and interest under a mortgage bearing interest at one percent and (2) a fair market rental charge determined on the basis of operating the project with payments of principal, interest and mortgage insurance premiums due under the insured mortgage on the project;

PRIVATE DEFENDANTS'
EXHIBIT ONE

(b) the rental charged for each unit, which will include all utilities except telephone, will be equal to 25% of the tenant's income or the basic rental, whichever is greater, but in no event shall the rental charged exceed the fair market rental;

(c) they shall limit admission to the project to those families whose incomes do not exceed the limits prescribed by the Commissioner, with the exception of those tenants who agree to pay fair market rental;

(d) preference for occupancy shall be given to those families displaced from an urban renewal area, or as a result of governmental action, or as a result of a disaster determined by the President to be a major disaster, and to those families whose incomes are within the lowest practicable limits for obtaining rental units in the project;

(e) on forms approved by the Commissioner they will obtain from each prospective tenant, prior to admission to the project, a certification of income, and a recertification of income from all tenants who are not paying fair market rental at intervals as required by the Commissioner;

(f) if any recertification reveals a change in income whereby the tenant becomes eligible for a lower or higher rental, such adjustment in rental charged shall be made, provided that rental shall never be less than basic rental and shall never exceed fair market rental;

(g) in a manner prescribed by the Commissioner, they will obtain written evidence substantiating the information given on the tenants' certifications and recertifications of income and shall retain the evidence in their files for three years;

(h) they shall require all tenants who do not pay the fair market rental to execute a lease in the form prescribed by the Commissioner, and shall not rent any unit in the project for less than 30 days nor more than one year; (i) beginning with the commencement of the interest reduction payment contract they shall remit to the Commissioner on or before the tenth day of each month the amount by which the total rentals collected on the dwelling units exceeds the sum of the approved basic rentals for all occupied units, which remittance shall be accompanied by a monthly report on a form approved by the Commissioner, provided that a monthly report must be filed even if no remittance is required;

(j) they shall not restrict occupancy by reason of the fact that there are children in the family, except in those projects that are designed primarily for elderly persons;

(k) they will rent commercial facilities, if any, at not less than the rental approved by the Commissioner;

(l) no change will be made in the basic rental or fair market rental unless approved by the Commissioner;

(m) no tenant shall be permitted to rent more than one unit at any given time without the prior written approval of the Commissioner;

(n) if there are rent supplement units in the project, the determination as to the eligibility of tenants for admission to such units and the conditions of continued occupancy shall be in accordance with the Rent Supplement Contract executed by the Owners and the Commissioner which is incorporated in and made a part of this Agreement.

5. Upon prior written approval of the Commissioner, the Owners may charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between the tenant and the Owners for any facilities and/or services which may be furnished by the Owner or others to such tenant upon his request, in addition to the facilities and services included in the approved Rental Schedule.

6. Owners shall not without the prior written approval of the Commissioner:

(a) Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property;

(b) Assign, transfer, dispose of, or encumber any personal property of the project, including rents, or pay out any funds, other than from surplus cash, except for reasonable operating expenses and necessary repairs;

(c) Convey, assign, or transfer any beneficial interest in any trust holding title to the mortgaged property, or the interest of any general partner in a partnership owning the mortgaged property, or any right to manage or receive the rents and profits from the mortgaged property;

(d) Remodel, add to, reconstruct, or demolish any part of the mortgaged property or subtract from any real or personal property of the project;

(e) Make, or receive and retain, any distribution of assets or any income of any kind of the project, except from surplus cash and except on the following conditions:

(1) All distributions shall be made only as of or after the end of a semiannual or annual fiscal period, and only as permitted by the law of the applicable jurisdiction; all such distributions in any one fiscal year shall be limited to six per centum on the initial equity investment, as determined by the Commissioner; and the right to such distribution shall be cumulative;

PRIVATE DEFENDANTS' EXHIBIT ONE

(2) No distribution shall be made from borrowed funds or prior to the completion of the project or when there is any default under this Agreement or under the note or mortgage;

(3) Any distribution of any funds of the project, which the party receiving such funds is not entitled to retain hereunder, shall be held in trust separate and apart from any other funds;

(4) There shall have been compliance with all outstanding notices of requirements for proper maintainance of the project.

(f) Engage, except for natural persons, in any other business or activity, including the operation of any other rental project, or incur any liability or obligation not in connection with the project;

(g) Require, as a condition of the occupancy or leasing of any unit in the project, any consideration or deposit other than the prepayment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease. Any fund collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account;

(h) Permit the use of the dwelling accommodations of the project for any purpose except the use which was originally intended, or permit commercial use greater than that originally approved by the Commissioner;

(i) Incur any liability, direct or contingent, other than for current operating expenses, exclusive of the indebtedness secured by the mortgage and necessarily incident to the execution and delivery thereof;

(j) Pay any compensation, including wages or salaries, or incur any obligations, to themselves, or any officers, directors, stockholders, trustees, partners, beneficiaries under a trust, or to any of their nominees;

(k) Enter into any contract or contracts for supervisory or managerial services.

7. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. In the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money derived from any insurance on the property shall be applied in accordance with the terms of the insured mortgage.

8. Owners shall not file any petition in bankruptcy, or for a receiver, or in insolvency, or for reorganization or composition, or make any assignment for the benefit of creditors or to a trustee for creditors or permit an adjudication in bankruptcy, the taking possession of the mortgaged property or any part thereof by a receiver, or the seizure and sale of the mortgaged property or any part thereof under judicial process or pursuant to any power of sale and fail to have such adverse actions set aside within forty-five days.

9. (a) Owners shall provide for the management of the project in a manner satisfactory to the Commissioner. Any management contract entered into by Owners, or any of them, involving the project shall contain a provision that it shall be subject to termination, without penalty and with or without cause, upon written request by the Commissioner addressed to the Owners. Upon receipt of such request Owners shall immediately terminate the contract within a period of not more than thirty (30) days and shall make arrangements satisfactory to the Commissioner for continuing proper management of the project.

(b) Payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies, or materials in the area where the services are rendered or the supplies or materials furnished.

(c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers relating thereto shall at all times be maintained in reasonable condition for proper audit and shall be subject to examination and inspection at any reasonable time by the Commissioner or his duly authorized agents. Owners shall keep copies of all written contracts or other instruments which affect the mortgaged property, all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.

(d) The books and accounts of the operations of the mortgaged property and of the project shall be kept in accordance with the requirements of the Commissioner.

(e) Within sixty days following the end of each fiscal year the Commissioner shall be furnished with a complete annual financial report based upon an examination of the books and records of the mortgagor prepared in accordance with the requirements of the Commissioner certified to by an officer or responsible Owner and, when required by the Commissioner, prepared and certified by a Certified Public Accountant, or other person acceptable to the Commissioner.

(f) At the request of the Commissioner, his agents, employees, or attorneys, the Owners shall furnish monthly occupancy reports and shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage.

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PRIVATE DEFENDANTS' EXHIBIT ONE

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(g) All rents and other receipts of the project shall be deposited in the name of the project in a bank, whose deposits are insured by the F.D.I.C. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for expenses of the project, remittances to the Commissioner as required under Paragraph 4(i) above, or for distributions of surplus cash as limited by Paragraph 6(e) above. Any owner receiving funds of the project other than by such distribution of surplus cash shall immediately deposit such funds in the project bank account and failing so to do in violation of this Agreement shall hold such funds in trust. Any owner receiving property of the project in violation of this Agreement shall immediately deliver such property to the project and failing so to do shall hold such property in trust.

10. Owners will comply with the provisions of any Federal, State, or local law prohibiting discrimination in housing on the grounds of race, color, creed, or national origin, including Title VI of the Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241), all requirements imposed by or pursuant to the Regulations of the Department of Housing and Urban Development (24 CFR, Subtitle A, Part 1) issued pursuant to that title, and regulations issued pursuant to Executive Order 11063.

11. Upon a violation of any of the above provisions of this Agreement by Owners, the Commissioner may give written notice, thereof, to Owners, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice thereof to the Commissioner, be designated by the Owners as their legal business address. If such violation is not corrected to the satisfaction of the Commissioner within thirty days after the date such notice is mailed or within such further time as the Commissioner reasonably determines is necessary to correct the violation, without further notice the Commissioner may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Commissioner may:

(a)(1) If the Commissioner holds the note - declare the whole of said indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage;

(2) If said note is not held by the Commissioner - notify the holder of the note of such default and request holder to declare a default under the note and mortgage, and the holder after receiving such notice and request, but not otherwise, at its option, may declare the whole indebtedness due, and thereupon proceed with foreclosure of the mortgage, or assign the note and mortgage to the Commissioner as provided in the Regulations;

(b) Collect all rents and charges in connection with the operation of the project and use such collections to pay the mortgagor's obligations under this Agreement and under the note and mortgage and the necessary expenses of preserving the property and operating the project;

(c) Take possession of the project, bring any action necessary to enforce any rights of the Owners growing out of the project operation, and operate the project in accordance with the terms of this Agreement until such time as the Commissioner in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement and in compliance with the requirements of the note and mortgage;

(d) Apply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violation of the Agreement, for the appointment of a receiver to take over and operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to the Commissioner arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain;

(e) Terminate the interest reduction payments to the mortgagee made pursuant to Paragraph 1 hereinabove.

12. As security for the payment due under this Agreement to the reserve fund for replacements, and to secure the Commissioner because of his liability under the endorsement of the note for insurance, and as security for the other obligations under this Agreement, the Owners respectively assign, pledge and mortgage to the Commissioner their rights to the rents, profits, income and charges of whatever sort which they may receive or be entitled to receive from the operation of the mortgaged property, subject, however, to any assignment of rents in the insured mortgage referred to herein. Until a default is declared under this Agreement, however, permission is granted to Owners to collect and retain under the provisions of this Agreement such rents, profits, income, and charges, but upon default this permission is terminated as to all rents due or collected thereafter.

13. As used in this Agreement the term:

(a) "Mortgage" includes "Deed of Trust", "Chattel Mortgage", and any other security for the note identified herein, and endorsed for insurance or held by the Commissioner;

(b) "Mortgagee" refers to the holder of the mortgage identified herein, its successors and assigns;

(c) "Mortgagor" means the original borrower under the mortgage and its successors and assigns;

(d) "Owners" refers to the persons named in the first paragraph hereof and designated as Owners, their successors and assigns;

PRIVATE DEFENDANTS' EXHIBIT ONE

(e) "Mortgaged Property" includes all property, real, personal, or mixed covered by the mortgage or mortgages securing the note endorsed for insurance or held by the Commissioner;

(f) "Project" includes the mortgaged property and all its other assets of whatsoever nature or wheresoever situate, used in or owned by the business conducted on said mortgaged property, which business is to provide housing and other such activities as are incidental thereto;

(g) "Surplus Cash" means any cash remaining after:

(1) the payment of:

(i) All sums due or currently required to be paid under the terms of any mortgage or note insured or held by the Federal Housing Commissioner;

(ii) All amounts required to be deposited in the reserve fund for replacements;

(iii) All obligations of the project other than the mortgage insured or held by the Commissioner unless funds for payment are set aside or deferment of payment has been approved by the Commissioner;

(iv) Remittances due to the Commissioner as required by Paragraph 4(i); and

(2) the segregation of:

(i) An amount equal to the aggregate of all special funds required to be maintained by the project;

(ii) All tenant security deposits held;

(iii) That portion of rentals which must be remitted to the Commissioner in accordance with Paragraph 4(i), but not yet due.

(h) "Residual Receipts" means any cash remaining at the end of a semiannual or annual fiscal period after deducting from surplus cash the amount of all distributions as that term is defined below and as limited by Paragraph 6(e) hereof;

(i) "Family" means (1) two or more persons related by blood, marriage, or operation of law, who occupy the same unit; (2) a handicapped person who has a physical impairment which is expected to be of long continued and indefinite duration, substantially impedes his ability to live independently, and is of such a nature that his ability to live independently could be improved by more suitable housing conditions; (3) a single person, 62 years of age or older; or (4) a single person less than 62 years of age provided that occupancy by such persons is limited to 10% of the dwelling units in the project;

(j) "Distribution" means any withdrawal or taking of cash or any assets of the project, including the segregation of cash or assets for subsequent withdrawal within the limitations of Paragraph 6(e) hereof, and excluding payment for reasonable expenses incident to the operation and maintenance of the project;

(k) "Income" means the gross annual income of the family from all sources before taxes and withholding, after giving effect to exclusions allowed by the Commissioner;

(l) "Default" means a default declared by the Commissioner when a violation of this Agreement is not corrected to his satisfaction within the time allowed by this Agreement or such further time as may be allowed by the Commissioner after written notice.

14. This instrument shall bind, and the benefits shall inure to, the respective Owners, their heirs, legal representatives, executors, administrators, successors in office or interest, and assigns, and to the Commissioner and his successors so long as the contract of mortgage insurance continues in effect, and during such further time as the Commissioner shall be the owner, holder, or reinsurer of the mortgage, or obligated to reinsure the mortgage.

15. Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.

16. The invalidity of any clause, part or provision of this Agreement shall not effect the validity of the remaining portions thereof.

17. The following ~~xxxxx~~ partners of the Owner: Jona Goldrich as trustee, Sol Kest as trustee, R. Stern and Robert Hirsch (and all hereafter admitted partners) do not assume personal liability for payments due under the note and mortgage, to the reserve for replacements, or for matters not under their control, except:

(a) for funds or property of the project coming into their hands which, by the provisions hereof, they are not entitled to retain; and

(b) for their own acts and deeds or acts and deeds of others which they have authorized in violation of the provisions hereof.

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PRIVATE DEFENDANTS' EXHIBIT ONE

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the date first hereinabove written.

MEYLER PARK APARTMENTS,
a limited partnership
*Owners*

Seal

WITNESS

By _____
R. Stern General Partner

SECRETARY OF HOUSING AND URBAN DEVELOPMENT
acting by and through the FEDERAL HOUSING
COMMISSIONER

By _____
*Authorized Agent*

(Add proper acknowledgments)

STATE OF CALIFORNIA )
: ss.
COUNTY OF LOS ANGELES )

On DECEMBER 27, 1971, before me, the undersigned, a Notary Public in and for said State, personally appeared R. STERN, known to me to be one of the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same.

WITNESS my hand and official seal.

Signature _____

OFFICIAL SEAL
ALAN D. ROSS
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
[illegible] COUNTY
My Commission Expires Feb. 27, 1972

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PRIVATE DEFENDANTS' EXHIBIT ONE

Schedule A

Legal Description for FHA Project No. 122-44537-LDP

PARCEL 1:
The land referred to in this report is situated in the county of Los Angeles, state of California, and is described as follows:

Lot 14 in Block "V" of Valambrosa Tract, in the city of Los Angeles, County of Los Angeles, state of California, as per map recorded in Book 10 Page 109 of Maps, in the office of the County Recorder of said county.

Except the westerly 20 feet thereof and except all that portion of said lot 14 being a strip of land 10 feet wide extending from the northerly line to the southerly line of said lot; the westerly line of said strip being 2 feet easterly from and measured at right angles to and parallel with the prolongation southerly of the westerly line of Meyler Street shown on map of said Valambrosa Tract.

PARCEL 2:
That portion of lot number, in Roman numerals, "II" on the plat of the subdivision of Lot "M" of original partition of the Rancho Los Palos Verdes, partly in the City of Los Angeles, in the County of Los Angeles, State of California, as shown on the map filed in Book 1 page 47 of record of surveys' in the office of the County Recorder of said county, described as follows:

That portion of the 34 foot strip of land described in the deed from John T. Gaffey and wife, to Pacific Electric Land Company, recorded in Book 3078 Page 241 of deeds, records of said county, lying easterly of the southerly prolongation of the westerly line of Meyler Street, as shown on the map of Valambrosa Tract recorded in Book 10 Page 109 of Maps, in the office of said County Recorder.

Except that portion thereof lying southerly of the northerly line of Fifth Street as shown on the map of the Mirador Tract, recorded in Book 2 Page 39 of Maps, records of said county.

PARCEL 3.
That portion of La Alameda Alley, lying southerly of the Pacific Electric Railroad right of way, as said right of way is shown 34 feet wide on the map of Mirador Tract No. 3, in the city of Los Angeles, county of Los Angeles, state of California, as per map recorded in Book 5 Page 84 of Maps, in the office of the County Recorder of said county, bounded southerly by the westerly prolongation of the easterly line of Meyler Street, as said street is shown 70 feet wide on said map; and bounded southeasterly by the easterly prolongation of the northerly line of Fifth Street as said street is shown 60 feet wide on said map.

Excepting from the above parcels 1, 2 and 3, all mineral, oil, gas, petroleum, naptha and other hydrocarbon substances, without any right to enter upon the surface nor upon the subsurface to a depth of 500 feet "measured vertically" below the present surface of said land as granted to Jona Goldrich, as Trustee of the Goldrich Trust No. 1, dated August 4, 1971, Sol Kest, as Trustee of the Kest Trust No. 1, dated April 1, 1971, Robert Hirsch, and Robert I. Stern each as to an undivided one-fourth -1/4- interest, by deed recorded December , 1971 as Instrument No.

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1 and only page of Schedule A

PRIVATE DEFENDANTS' EXHIBIT ONE

FHA FORM NO. 3452
Rev. 6/66

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION

Form Approved
Budget Bureau No. 63-R118.5

## RENTAL SCHEDULE AND INFORMATION ON RENTAL PROJECT

| Name of Project Owner (Mortgagor) | FHA Project No. |
|---|---|
| HEYLER PARK APARTMENTS | 122-44537-LDP |

| Name of Project | Address of Principal Office |
|---|---|
| HEYLER PARK APARTMENTS | 425 So. Fairfax Avenue, Suite 300<br>Los Angeles, California 90036 |

| Name, Title and Address of Representative to Whom Correspondence should be addressed | Fiscal Year of Project |
|---|---|
| | |

TYPE OF MORTGAGOR ENTITY: 1. ☐ Corporation 2. ☒ Partnership 3. ☐ Joint Venture
4. ☐ Tenants in Common 5. ☐ Trust 6. ☐ Individual 7. ☐ Other (Specify)

LIST OF PRINCIPALS COMPRISING MORTGAGOR ENTITY -- (Instructions for completion: In Listing principals, give name and Social Security number. 1. Corporation: List all officers and directors, and stockholders holding at least a 10% interest, stating number of shares and type of stock held by each. If another legal entity is stockholder, list its name, type of entity, and principals as required herein. If stock is known to be encumbered in any manner, state manner and reasons for encumbrances. List name and address of Corporate Resident Agent, if any; 2. Partnership, 3. Joint Venture and 4. Tenants in Common: List all general partners, joint venturers or tenants in common. Designate and give the address of the general partner, joint venturer or tenant in common, whom FHA may hold responsible for fulfillment of the mortgagor's obligations and responsibilities. If any general partner, joint venturer or tenant in common is a corporation or trust, give information required herein for such entity; 5. Trust: List all beneficiaries having at least a 10% interest, as well as managers, directors, or trustees. Give the address of such official whom FHA may hold responsible for fulfillment of the mortgagor's obligations and responsibilities. --- If space below is insufficient, continue listing on an attached sheet.)

| | | |
|---|---|---|
| JONA GOLDRICH, 722 North Alta Drive, Beverly Hills, Ca. | 35% | 95-6331077 |
| as Trustee of the Goldrich Trust No. 1., dated August 4, 1971 | | |
| SOL KEST, 6601 Drexel Avenue, Los Angeles, Ca. 90048 | 25% | 95-6305738 |
| as Trustee of the Kest Trust, No. 1., dated April 1, 1971 | | |
| ROBERT HIRSCH, 4961 Densmore Avenue, Encino, Ca. 91316 | 15% | 359-22-4911 |
| ROBERT I. STERN, 3531 Summerfield Drive, Sherman Oaks, Ca. 91403 | 25% | 568-20-0687 |

(Complete all information on Reverse Side)

RENTAL SCHEDULE FOR INCOME PRODUCING SPACE-DWELLINGS NOT INCLUDING FURNITURE RENTS

| Type of Unit | Unit Composition (Insert Description)* | Column 1 No. of Units | Column 1 Rental Rate | Column 1 Total Monthly Income | Column 2 No. of Units | Column 2 Rental Rate | Column 2 Total Monthly Income | Column 3 No. of Units | Column 3 Rental Rate | Column 3 Total Monthly Income |
|---|---|---|---|---|---|---|---|---|---|---|
| Efficiency | | | $ | $ | | $ | $ | | $ | $ |
| 0-Bedroom | | | | | | | | | | |
| 1-Bedroom | LR, DA, K, 1 BR, 1 B | 93 | 105.32 | 10321.36 | | | | | | |
| 2-Bedroom | | | | | | | | | | |
| 3-Bedroom | | | | | | | | | | |
| 4-Bedroom | | | | | | | | | | |
| TOTALS → | | | | $ 10321.36 | | | $ | | | $ |

*USE THE FOLLOWING SYMBOLS:
LU - LIVING UNIT  K - KITCHEN
LR - LIVING ROOM  KETTE - KITCHENETTE
DR - DINING ROOM  BR - BEDROOM
DA - DINING ALCOVE  B - BATH

EXAMPLE: LR - DA - K - 2 BR - 1 B

| | | |
|---|---|---|
| TOTALS FROM COL. 1 | | $ 10321.36 |
| TOTALS FROM COL. 2 | | $ |
| TOTAL UNITS AND GROSS MONTHLY DWELLING INCOME | | $ 10321.36 |
| GROSS POTENTIAL ANNUAL DWELLING RENT INCOME | | $ 123856.32 |

SERVICES AND EQUIPMENT INCLUDED IN RENT: (Check appropriate boxes)

- [x] Ranges
- [x] Garbage Disposals
- [ ] Space Heat
- [x] Gas
- [x] Air Conditioning Units
- [ ] Power Including
- [x] Refrigerators
- [x] Laundry Facilities
- [x] Water (Hot and Cold)
- [x] Electricity
- [x] Carpets
- [x] x Drapes
- [ ] Dishwashers
- [ ] Central Heat
- [ ] Water (Cold only)
- [ ] Central Air Conditioning
- [x] ~~Kitchen Exhaust Fan~~

OTHER INCOME PRODUCING SPACE:

| Type | No. in Project | Number of Units & Unit Rent Per Month | | | | | |
|---|---|---|---|---|---|---|---|
| | | Units | @ $ | Units | @ $ | Units | $ |
| Garages | | | | | | | |
| Stores | | | | | | | |
| Offices | | | | | | | |
| Laundry | | | | | | | 148.50 |

NON-REVENUE PRODUCING DWELLING SPACES:

| Composition of Unit (Insert Description) | No. of Each Type Unit | Per Annum Rental Value Assigned Unit Type | Use (Janitor, Office, Resident Manager, etc.) |
|---|---|---|---|
| LR, DA, K, 2 BR, 1 B, Office | 1 | $ 1504.68 | Office |
| | | | |
| | | | |
| | | | |

I hereby certify that (1) the information contained on page 1 and 2 is complete, correct, to in accordance with the owner's records, and (2) no increases in approved dwelling rentals will be made without prior written consent of the Federal Housing Administration.

Date March 27, 19 72  Signature [signature]

Title Jona Goldrich, Partner

92172-P Rev. 6/68

[illegible], D. C.

PRIVATE DEFENDANTS' EXHIBIT TWO

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COPY



August 7, 1974

Mr. Irving Kaplan,
Director of Loan Management Division
Dept. of Housing & Urban Development
2500 Wilshire Boulevard
Los Angeles, California 90057

Subject: Meyler Park Apartments
San Pedro, California
FHA Project No. 122-44537-LDP

Dear Mr. Kaplan:

We have just completed a projection of the operations of the captioned complex. This projection is based on the actual operations for the year ended February 28, 1974 and anticipated increased costs.

Using the statement of income for the twelve months and adjusting the net loss for depreciation, mortgage amortization, reserve for replacement payments and the allowed dividend yields a net cash loss of $5,460. To this loss, we have added adjustments for property taxes and utility cost increases as follows:

| | |
|---|---|
| Cash loss (per attached statement) | $ 5,460 |
| Property tax increase (per statement $17,933; per 1973/1974 tax bill $24,730) | 6,797 |
| Anticipated utility cost increases | 1,500 |
| Projected Cash Loss | $13,757 |

In order to offset the cash loss incurred and to effectively cope with the projected loss, it will be necessary to increase rents as follows:

| 98 One Bedroom Apartments | |
|---|---|
| Present Rent | $105.32 |
| Requested Increase | 14.68 |
| Proposed Rent | $120.00 |

Continued on Page 2.

PRIVATE DEFENDANT'S EXHIBIT THREE

ross potential
.cancies

As you know, this complex has been run quite effectively and it is our intention to continue the good work. Based upon the above analysis, we will be forced to operate at a deficit. In order to continue operating at the high standards we impose upon ourselves, it is imperative that this proposed rent increase be granted.

Enclosed for your review is a copy of the notice to residents as posted. Please be advised that we have received no written comments or objections at this time.

We, the undersigned, hereby submit the data, material and information contained herein and in the attachments hereto for the purpose of obtaining the approval of the U. S. Department of Housing and Urban Development of the rent increase herein proposed and we certify under the penalties and provisions of Title 18, United States Code, Sections 1001 and 1010 that the statements contained in the rent increase application, this certification and the attachments hereto have been examined by us and are true, correct and complete.

Very truly yours,

MEYLER PARK APARTMENTS

Warren Breslow,
Director of Finance

WLB/lp
Enclosures

PRIVATE DEFENDANTS'S EXHIBIT THREE

-16-

COPY

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
LOS ANGELES AREA OFFICE
2500 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA 90057

September 16, 1974

REGION IX
450 Golden Gate Avenue
P.O. Box 36003
San Francisco, California 94102

IN REPLY REFER TO:
9.2HL -Bullock
688 - 5844

Goldrich & Kest
425 So. Fairfax Avenue
Los Angeles, California 90036

Gentlemen:

Subject: Project No. 122-44537-LMP
Meyler Park Apartments

We are approving a rental increase at subject project because of increased utility, payroll, repairs and ground maintenance costs.

Enclosed is your approved copy of HUD 92458, Rental Schedule for this project. The equipment and services marked on this form are required to be provided as a condition of this approval.

The approved maximum annual gross rental is $133,072 including garages and all services. This represents a [illegible] percentage increase over the previous annual gross of $[illegible].

| | | The Basic Rent Per Month is: | The Unit Market Rent Per Month is: |
|---|---|---|---|
| 1 | Bedroom | $ 116.00 | $ 178.00 |
| 2 | Bedroom | $ 139.00 | $ 202.00 |
| 3 | Bedroom | $ N/A | $ N/A |
| 4 | Bedroom | $ N/A | $ N/A |
| ____ | Bedroom | $ | $ |

As a condition of the approval you are required to comply with applicable state laws with respect to: notification to tenants, and to post a copy of this letter in the same or similar conspicuous public places that the Notice to Tenants of Proposed Application for Rent Increases had been posted. This approval is subject to such letter being posted for not less than thirty (30) days prior to the effective date of the rent increase. The effective date of this increase can be no sooner than October 16, 1974.

For Director
Director
Loan Management Branch

Enclosure

PRIVATE DEFENDANTS'S EXHIBIT THREE
-17-

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| Type of Unit | Unit Composition (Room Designation) | No. of Units | Rental Rate | Total Monthly Income | No. of Units | Rental Rate | Total Monthly Income | No. of Units | Rental Rate | Total |
|---|---|---|---|---|---|---|---|---|---|---|
| Efficiency | | | $ | $ | | $ | $ | | $ | $ |
| 1-Bedroom | | | | | | | | | | |
| | LR,DA,K,1BR.,B. | 63 | 112 | 7,056 | | | | 2 | [illegible] | [illegible] |
| 1-Bedroom | B | | | | | | | | | |
| | LR,DA,K,2BR., | 1 | 169 | 169 | | | | 1 | 169 | |
| 2-Bedroom | B | | | | | | | | | |
| 2-Bedroom | | | | | | | | | | |
| 2-Bedroom | | | | | | | | | | |
| TOTALS → | | | $ | 11,606 | | $ | | | $ | |

Director, Team Management

USE THE FOLLOWING SYMBOLS:
LU - LIVING UNIT K - KITCHEN
LR - LIVING ROOM KETTE - KITCHENETTE
DR - DINING ROOM BR - BEDROOM
DA - DINING ALCOVE B - BATH

EXAMPLE: LR - DA - K - 2 BR - 1 B

| | |
|---|---|
| TOTALS FROM COL. 1 | $ 11,6 |
| TOTALS FROM COL. 2 | $ |
| TOTAL UNITS AND GROSS MONTHLY DWELLING INCOME | $ 11,6 |
| GROSS POTENTIAL ANNUAL DWELLING RENT INCOME | $139,2 |

EQUIPMENT AND SERVICES INCLUDED IN RENT: (Check Appropriate Items)

EQUIPMENT –
- [ ] Ranges (Gas or Elec.)
- [ ] Refrig. (Gas or Elec.)
- [ ] Air Cond. (Equip. Only)
- [ ] Kitchen Exhaust Fan
- [ ] Laundry Facilities
- [X] Disposal
- [ ] Dishwasher
- [X] Carpet
- [X] Drapes
- [ ] Other (Specify)

SERVICES –
GAS: [ ] Heat [X] Hot Water [X] Cooking [ ] Air Conditioning
ELECT: [ ] Heat [ ] Hot Water [ ] Cooking [ ] Air Conditioning [X] Lights, etc. in Unit
OTHER FUEL: [ ] Heat [ ] Hot Water
[X] WATER [X] OTHER [illegible]

OTHER INCOME PRODUCING SPACES:

| Type | No. in Project | Number of Units / Unit Rent Per Month | | | | | |
|---|---|---|---|---|---|---|---|
| Garages | | Units | $ | Units | $ | Units | $ |
| Stores | | | | | | | |
| Offices | | | | | | | |
| | | | | | | | |

NON-REVENUE PRODUCING DWELLING SPACES:

| Composition of Unit (Room Description) | No. of Each Type Unit | Per Annum Rental Value Assigned Unit Type | Use (Janitor, Office, Resident Manager, etc.) |
|---|---|---|---|
| LR,DA,K,2BR.,B. | 1 | $ 1,656 | Manager |
| | | | |
| | | | |
| | | | |

I hereby certify that (1) the information contained on page 1 and 2 is complete, correct, and in accordance with the owner's records; (2) no increases in approved dwelling rentals will be made without prior written consent of HUD.

Date: September 9, 1974

Signature [illegible]

Title [illegible] Project Manager

(If corporation, must be executed by officer or agent thereof)

RECEIVED
JUL 7 1975
C & K MANAGEMENT

July 3, 1975

Mr. Irving Kaplan
Director of Loan Management Branch
Dept. of Housing & Urban Development
2500 Wilshire Boulevard
Los Angeles, California 90057

Attention: Mr. Herb Goldstein

Subject: Meyler Park Apartments
FHA Project No. 122-44537-LDP

Dear Mr. Goldstein:

We have recently completed a review of the operations of the captioned complex. This analysis was based upon the actual operations for the year ended February 28, 1975.

The statement of income and expenses for the 12 months shows a cash loss, including the limited dividend, of approximately $11,500. Unpaid cumulative dividends as of February 28, 1975, amounted to $19,953.

In order to offset the loss incurred, effectively cope with projected increased costs and provide for a $3.00 per unit, per month, painting reserve, it will be necessary to increase rents as follows:

| | Present Rent | Proposed Increase | Proposed Rent |
|---|---|---|---|
| One Bedroom | $116.00 | $15.00 | $131.00 |

Also enclosed is a copy of the notice to residents as posted. Please be advised that we have received several written comments and objections as of this date. These objections relate to the residents' inability to afford a rental increase.

PRIVATE DEFENDANTS' EXHIBIT FOUR
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We, the undersigned, hereby certify that a notice of Proposed Application for Rent Increase was posted in three or more conspicuous places in each structure of the complex. Said notices were posted on or about May 27, 1975, and remained posted for at least 30 days hence. Said notice advised residents that an application for rental increase was to be filed in 30 days with the Department of Housing and Urban Development. Further, it advised residents of the reason and that all the data which we proposed to submit to HUD in justification for the proposed rent increase would be available for their inspection. We have complied with any and all requests by the residents to inspect said data. Said notice advised residents that they could submit to us and/or to the Department of Housing and Urban Development written comments or objections to the proposed rent increase.

We, the undersigned, hereby submit the data, material and information contained herein and in the attachments hereto for the purpose of obtaining the approval of the U.S. Department of Housing and Urban Development of the rent increase herein proposed and we certify under penalties and provisions of Title 18, United States Code, Sections 1001 and 1010 that the statements contained in the rent increase application, this certification and the attachments hereto have been examined by us and are true, correct and complete.

Very truly yours,

HEYLER PARK APARTMENTS

Warren L. Breslow
Director of Finance

WLB/ll
Encl.

PRIVATE DEFENDANTS' EXHIBIT FOUR

MEYLER PARK APARTMENTS
PROJECT NO. 122-44337-LDP
STATEMENT OF INCOME
YEAR ENDED FEBRUARY 28, 1975

| | | | |
|---|---|---|---|
| **INCOME** | | | |
| Rents - gross potential (Note 5) | $129,081 | | |
| Less: vacancies | --- | $129,081 | |
| Service income | | 1,044 | |
| Interest income | | 199 | |
| TOTAL INCOME | | | $130,324 |
| **EXPENSES** | | | |
| Renting expense (Schedule D) | | 1,929 | |
| Administrative expense (Schedule D) | | 15,006 | |
| Operating expense (Schedule D) | | 16,917 | |
| Maintenance expense (Schedule D) | | 18,040 | |
| Depreciation | | | |
| Buildings | 45,117 | | |
| Carpeting, draperies and equipment | 7,129 | 52,246 | |
| Taxes and insurance | | | |
| Property taxes | 26,724 | | |
| Licenses | 180 | | |
| Payroll taxes | 748 | | |
| Insurance | 1,096 | 28,748 | |
| Financial expense | | | |
| Interest on mortgage | 30,540 | | |
| Insurance on mortgage | 8,739 | 39,279 | |
| TOTAL EXPENSES | | | 172,165 |
| NET LOSS | | | $(41,841) |

See auditors' report and notes to financial statements.

NANAS, STERN, BIERS AND CO.
CERTIFIED PUBLIC ACCOUNTANTS · BEVERLY HILLS

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PRIVATE DEFENDANTS'S EXHIBIT FOUR

MEYLER PARK APARTMENTS
PROJECT NO. 122-44537-LDP
SCHEDULE OF EXPENSES
YEAR ENDED FEBRUARY 28, 1975

| | | |
|---|---|---|
| **RENTING EXPENSE** | | |
| Advertising | $ 1,148 | |
| Miscellaneous | 781 | |
| TOTAL RENTING EXPENSE | | $ 1,929 |
| **ADMINISTRATIVE EXPENSE** | | |
| Office salaries | 1,148 | |
| Office expense | 709 | |
| Management fees | 8,944 | |
| Manager's salary - value of apartment included in gross rents (Note 5) | 1,307 | |
| Auditing expense | 2,380 | |
| Telephone and telegraph | 455 | |
| Miscellaneous | 63 | |
| TOTAL ADMINISTRATIVE EXPENSE | | $15,006 |
| **OPERATING EXPENSE** | | |
| Janitor's payroll | 1,530 | |
| Electricity | 8,901 | |
| Water | 2,506 | |
| Gas | 3,035 | |
| Exterminating | 216 | |
| Rubbish removal | 729 | |
| TOTAL OPERATING EXPENSE | | $16,917 |
| **MAINTENANCE EXPENSE** | | |
| Grounds supplies and replacements | 122 | |
| Grounds contract | 7,746 | |
| Repairs payroll | 1,530 | |
| Repairs material | 2,012 | |
| Repairs contract | 2,411 | |
| Elevator maintenance | 1,303 | |
| Air conditioning repair and maintenance | 1,386 | |
| Decorating payroll | 1,530 | |
| TOTAL MAINTENANCE EXPENSE | | $18,040 |

See auditors' report and notes to financial statements.

NANAS, STERN, BIERS AND CO.
CERTIFIED PUBLIC ACCOUNTANTS · BEVERLY HILLS



PRIVATE DEFENDANTS' EXHIBIT FOUR

G & K
Management Co., Inc.
425 S. Fairfax Ave., Suite 300, Los Angeles, Calif. 90036

Thomas Gordon
President

NOTICE TO RESIDENTS OF INTENTION TO FILE AN APPLICATION TO HUD FOR AN INCREASE IN THE MAXIMUM PERMISSIBLE RENTS

May 29, 1975
Date of Posting

This is to advise you that 30 days from the date of posting noted above, we plan to file an application for approval of an increase in the maximum permissible rents for Meyler Park Apartments to the United States Department of Housing and Urban Development (HUD). The proposed increase is needed for the following reasons:

1. Utility costs have increased dramatically
2. Property taxes have increased
3. Repairs and maintenance have increased

The rent increases for which we plan to apply are:

| Bedrooms | Present Rate Basic | Proposed Increase | Proposed Rent Basic |
|---|---|---|---|
| 1 | $116.00 | $15.00 | $131.00 |

Please note that included in this proposed increase is $3.00 per unit to establish a painting reserve for future exterior painting of the buildings.

All materials that we intend to submit to HUD in support of our application will be available during normal business hours at the project office for a period of 30 days from the date of posting of this NOTICE for inspection and copying by residents of Meyler Park Apartments.

Residents of Meyler Park Apartments may submit comments in writing for or against the rental increase to us at 425 South Fairfax Avenue, Suite 300, Los Angeles, California 90036. These will be transmitted to HUD with our application for an increase. You may also send a copy of your comments directly to HUD, at the following address:

U.S. Department of Housing and Urban Development
2500 Wilshire Boulevard
Los Angeles, California 90057

Attention: Director, Loan Management Division
Re: FHA Project No. 122-44537-LDP
Meyler Park Apartments

Specialists in real property management

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PRIVATE DEFENDANTS'S EXHIBIT FOUR

G & K
Management Co., Inc.
[illegible] Fairfax Ave., Suite [illegible] Los Angeles, Calif. [illegible]



HUD may approve all, some, or none of the proposed rental increase. When HUD advises us in writing of its decision on our application, you will be notified at least 30 days before any allowable increase is put into effect. For those residents who are currently under leases with a term of more than a month, any allowable rent increase will not take place until the end of the term of the lease.

Sincerely,

G & K MANAGEMENT CO., INC.

Sherman Gardner
President

MEYLER PARK APARTMENTS
San Pedro, Calif.

July 23, 1975

Meyler Park Apartments
c/o Goldrich & Kest
425 So. Fairfax Avenue
Los Angeles, California 90036

Subject: Project No. 122-44537-LCP
Meyler Park Apartments

We are approving a rental increase at subject project because of demonstrated increases in elevator maintenance expense, utilities, labor repairs, real estate taxes, and exterior painting reserve subject to obtaining an increase in rent supplement funds.

Enclosed is your approved copy of HUD 92458, Rental Schedule for this project. The equipment and services marked on this form are required to be provided as a condition of this approval.

The approved maximum annual gross rental is $152,352 including garages and all services. This represents a 11 percent increase over the previous annual gross of $ 138,072 .

| | The Basic Rent Per Month is: | The Unit Market Rent Per Month is: |
|---|---|---|
| 1 Bedroom | $ 128 | $ 190 |
| 2 Bedroom | $ 152 | $ 225 |
| ____ Bedroom | $ | $ |
| ____ Bedroom | $ | $ |
| ____ Bedroom | $ | $ |

As a condition of the approval you are required to comply with applicable state laws with respect to notification to tenants. You are required to post a copy of this letter in the same or similar conspicuous public places that the Notice to Tenants of Proposed Application for Rent Increase had been posted. This approval is subject to such letter being posted for not less than thirty (30) days prior to the effective date of the rent increase. The effective date of this increase can be no sooner than September 1, 1975 .

Sincerely,

Director
Loan Management Branch

Enclosure LA FL 64 (6/75)

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PRIVATE-DEFENDANTS' EXHIBIT FIVE

RENTAL SCHEDULE AND INFORMATION ON RENTAL PROJECT

| Project Owner (Mortgagor) | Project No. |
|---|---|
| ER PARK APARTMENTS | 122-44233 |
| **Project** | **Address of Principal Office** |
| ER PARK APARTMENTS | 425 So. Fairfax Avenue<br>Los Angeles, California 90036 |
| Name and Address of Representative to Whom Correspondence should be addressed | Fiscal Year of Project |

OF MORTGAGOR ENTITY: 1. ☐ Corporation 2. ☒ Partnership 3. ☐ Joint Venture
Tenants in Common 5. ☐ Trust 6. ☐ Individual 7. ☐ Other _____

IF PRINCIPALS COMPRISING MORTGAGOR ENTITY --(Instructions for completion: In Column marginals [illegible] name and home address. 1. Corporation: List all officers and directors, and stockholders holding at least a 10% interest, stating number of shares of stock held by each. If another legal entity is stockholder, list its name, type of entity, and principals as required herein. If known to be encumbered in any manner, state manner and reasons for encumbrance. List name and address of Corporate Secretary, if any. 2. Partnership. 3. Joint Venture and 4. Tenants in Common: List all general partners, joint venturers or tenants in common and give the address of the general partner, joint venturer or tenant in common, upon whom HUD may hold responsible for fulfillment of mortgagor's obligations and responsibilities. If any general partner, joint venturer or tenant in common is a corporation or trust, formation required herein for such entity. 5. Trust: List all beneficiaries having at least a 10% interest, as well as managers, directors, trustees. Give the address of such official whom HUD may hold responsible for fulfillment of the mortgagor's obligations and responsibilities. --- If space below is insufficient, continue listing on an attached sheet.)

| | | |
|---|---|---|
| a Goldrich, Trustee | | |
| oldrich Trust No.1, 9/4/71 | 425 So. Fairfax Avenue. Los Angeles, CA | SS# 036-03-1493 |
| Kest, Trustee | | |
| est Trust No. 1, 4/1/71 | 425 So. Fairfax Ave. Los Angeles, CA | SS# 563-60-3123 |
| ert I. Stern | 3725 Crown Ridge Dr.Sherman Oaks, CA | SS# 568-01-1437 |
| ert Hirsch | 4961 Densmore Ave. Encino, CA | SS# 359-01-4221 |

| Unit Composition (Room Description) | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |
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| | | | | | | | | | |
| | | | | | | | | | |
| TOTALS → | | | $12,696 | | $ | | | $ | |

THE FOLLOWING SYMBOLS:
- LIVING UNIT
- LIVING ROOM
- DINING ROOM
- DINING ALCOVE
- KITCHEN
- KETTE-KITCHENETTE
- BR - BEDROOM
- B - BATH

PLE: LR - DA - K - 2 BR - 1 B

| | |
|---|---|
| TOTALS FROM COL. 1 | $12,696 |
| TOTALS FROM COL. 2 | $ |
| TOTAL UNITS AND GROSS MONTHLY DWELLING INCOME | $12,696 |
| GROSS POTENTIAL ANNUAL DWELLING RENT INCOME | $152,352 |

MENT AND SERVICES INCLUDED IN RENT: (Check Appropriate Items)

MENT —
- ...ange (Gas or Elec.)
- ...ship. (Gas or Elec.)
- ...r Cond. (Equip. Only)
- ...chen Exhaust Fan
- ...undry Facilities
- ...R INCOME PRODUCING SPACE

- Disposal
- Dishwasher
- Carpet
- Drapes
- Other (Specify)

SERVICES —
GAS: Heat, Cooking, Hot Water, Air Conditioning
ELECT: Heat, Cooking, Hot Water, Air Conditioning, Lights, etc. in Unit
OTHER FUEL: Heat, Hot Water
WATER, OTHER: Trash Disp.

| ...Type | Name Project | Number of Units and Rent Per Week | | | | | |
|---|---|---|---|---|---|---|---|
| | | Units | $ | Units | $ | Units | $ |
| | | | | | | | |
| | | | | | | | |
| | | | | | | | |

REVENUE PRODUCING DWELLING SPACES:

| ...Composition of Unit (Room Description) | No. of Each Type Unit | Per Annum Rental Value Assigned Unit Type | Use (Tenant, Office, Resident Manager, etc.) |
|---|---|---|---|
| ...DA, K, 2 BR, 3 | 1 | $ 1,824 | Manager |
| | | | |
| | | | |
| | | | |

...hereby certify that (1) the information contained on page 1 and 2 is correct, true and complete in accordance with the owner's records, and (2) the increases in approved dwelling rentals will be made without prior written consent of HUD.

July 28, 19 75

Signature

Title

PRIVATE DEFENDANT'S EXHIBIT FIVE

363

183

G.I.K.
Management Co., Inc.
4311 Wilshire Blvd., Suite 301, Los Angeles, Calif. 90010 (213) 936-7477

August 11, 1975

Mr. Irving Kaplan, Director
Loan Management Branch
Department of Housing and Urban Development
2500 Wilshire Boulevard
Los Angeles, CA 90057

Re: Meyler Park Apartments
FHA Project No.122-44537-LDP

Dear Mr. Kaplan:

In accordance with our recent conversations regarding provisions stated in Section 212F3, I am requesting the release of such funds for utilization at the subject complex to compensate for excessive increases in utilities (water, gas and electricity) and property taxes.

Since September 1972, these utilities have increased at an alarming rate of approximately $500.00 per month.

Also, in the fiscal period from March 1973 to March 1974, property taxes for Meyler Park increased $2300.00. We have not yet received the tax bill for the current fiscal period, however taxes on the subject property have increased each successive year and it is anticipated this year will not be an exception.

In view of the above described increases, your assistance is requested in facilitating the release of Assistance Payments funds provided for this purpose to compensate for these rising costs and to avoid imposing this burden on the Meyler Park residents in the form of a rental increase.

Very truly yours,

Sherman Gardner
President

PRIVATE DEFENDANTS' EXHIBIT SIX

-28-

SG:jp

specialists in real property management

EXHIBIT Y- CHART SHOWING 314.16' RIDE PER 1 INCH OF UTILITY AND PROPERTY TAX COSTS

| | INITIAL OPERATING COST (I.O.C.) * (1972-3) | | | | | 3/1/73 - 2/28/74 | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | ACTUAL TOTAL EXPENSE | ACTUAL INCREASE FROM I.O.C.* | ACTUAL INCREASE FROM PRIOR YEAR | % INCREASE FROM I.O.C. * | % INCREASE FROM PRIOR YEAR | ACTUAL TOTAL EXPENSE | ACTUAL INCREASE FROM I.O.C. * | ACTUAL INCREASE FROM PRIOR YEAR | % INCREASE FROM I.O.C.* | % INCREASE FROM PRIOR YEAR |
| UTILITY-ELECTRIC | 7,359 * | | | | | 7,990 | 631 | 631 | 8.57 | 8.57 |
| UTILITY-WATER | 1,941 * | | | | | 2,137 | 196 | 196 | 10.09 | 10.09 |
| UTILITY-GAS | 2,558 * | N/A | N/A | N/A | N/A | 2,815 | 257 | 257 | 10.05 | 10.05 |
| PROPERTY TAX | 15,592 * | | | | | 17,933 | 2,341 | 2,341 | 15.01 | 15.01 |
| TOTAL PROP + UTIL'S COST | 27,450 * | | | | | 30,935 | 3,485 | 3,485 | 12.70 | 12.70 |
| TOTAL MANAGEMENT BUDGET | 65,371 | | | | | 71,950 | 6,579 | 6,579 | 10.06 | 10.06 |

* ONLY TOTAL MANAGEMENT BUDGET STATED BY M.U.D.; ITEMIZED COSTS ARE ESTIMATES DERIVED FROM A RATIO OF THE INITIAL MANAGEMENT BUDGET AND THE 1973-74 MANAGEMENT BUDGET (90.65%)

| | 3/1/74 - 2/28/75 | | | | | "ALLOWED" (ESTIMATES) 1975-76 | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | ACTUAL TOTAL EARNINGS | ACTUAL INCREASE FROM T.O.C.K | ACTUAL INCREASE FROM PRIOR YEAR | % INCREASE FROM I.O.C | % INCREASE FROM PRIOR YEAR | ACTUAL TOTAL EARNINGS | ACTUAL INCREASE FROM I.O.C.* | ACTUAL INCREASE FROM PRIOR YEAR | % INCREASE FROM I.O.C | % INCREASE FROM PRIOR YEAR |
| UTILITY - ELECTRIC | 9,901 | 1,542 | 911 | 20.85 | 11.40 | 10,680 | 3,321 | 1,779 | 45.13 | |
| UTILITY - WATER | 2,506 | 565 | 369 | 29.11 | 17.27 | 2,740 | 819 | 234 | 42.19 | |
| UTILITY - GAS | 2,035 | 477 | 220 | 18.65 | 7.88 | 3,640 | 1,082 | 605 | 42.20 | |
| PROPERTY TAX | 26,724 | 11,132 | 8,791 | 71.40 | 49.02 | 27,220 | 11,628 | 496 | 74.58 | |
| TOTAL PROP. + UTIL COST | 41,166 | 13,716 | 10,291 | 49.97 | 33.27 | 44,800 | ** 14,850 | 3,134 | 61.58 | |
| TOTAL MANGAT BUDGET | 84,305 | 20,934 | 14,355 | 32.02 | 19.95 | 79,770 | 14,399 | ** (6,535) | 22.03 | |

** ACTUAL COST OF RISE IN UTILITIES AND PROPERTY TAX SINCE INITIAL OPERATING COST IS $16,850,
$16,850, DIVIDED BY 99 UNITS DIVIDED BY 12 MONTHS YIELDS A RISE OF $14.16 PER MONTH PER UNIT OR THE ACTUAL INCREASE IN PROPERTY TAXES AND UTILITIES SINCE INITIAL OCCUPANCY

EXHIBIT Y - P. 2

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

# RENTAL COMPUTATION FORM

| | | | |
|---|---|---|---|
| NUMBER OF UNITS | 9 | PROJECT NUMBER | 122-4 "537-LDP |
| NUMBER OF ROOMS | | NAME OF OWNER | Meyler Park Apartments LDP |
| NUMBER OF GARAGES | 0 | PROJECT NAME | Meyler Park Apartments |
| NUMBER OF STORES | 0 | LOCATION | 863 11th. Street, San Bernardino, Calif. |

## SECTION I. VERIFICATION OF EQUIPMENT AND SERVICES INCLUDED IN RENT

(Check applicable items in each column)

| ITEM | A. PREV. APPROVAL | B. EXISTING | C. APPROVED | ITEM | A. PREV. APPROVAL | B. EXISTING | C. APPROV. |
|---|---|---|---|---|---|---|---|
| Ranges (Gas or Electricity) | X | X | X | Electricity to Tenant | X | X | X |
| Refrigerators (Gas or Electricity) | X | X | X | Decorating | | | |
| Laundry Facilities | X | X | X | Furniture | | | |
| Water (Hot or Cold) | X | X | X | Other (Specify) Drapes Height | X | X | X |
| Space Heat | X | X | X | Air Conditioning | X | X | X |
| Gas to Tenant | X | X | X | Kitchen Fan | X | X | X |

## SECTION II. COMPARISON AND ALLOWANCE OF EXPENSES

| EXPENSE ITEM | A. FORM 2264 Dated 12-20 19 72 AMOUNT | B. USED FOR LAST RENT INCREASE Dated ____ 19__ AMOUNT | C. MORTGAGOR'S STATEMENT Dated 2-28 19 74 AMOUNT | D. ALLOWED Dated 5-3 19 74 AMOUNT | E. REMARKS |
|---|---|---|---|---|---|
| 1. Advertising | | | 1006 | 1010 | Figures rounded |
| 2 Commissions | | | 20 | | |
| 3 Management 7% | | | 8685 | | |
| 4 Resident Manager | | | 1264 | | |
| 5 Clerical | | | | | |
| 6 Telephone and Telegraph | | | 502 | | |
| 7. Office Expense | | | 1720 | | |
| 8 Legal and Audit | | | 33 | 40 | Actual |
| 9 Elevator Power | | | | | |
| 10. Elevator Maintenance | | | 2147 | 2150 | Actual |
| 11. Heating and Ventilating | | | 114 | 120 | " |
| 12 Janitorial Expense (Materials) | | | 139 | 140 | " |
| 13 Lighting (Misc. Power) | | | 7990 | 11990 | Actual plus 20% |
| 14 Water | | | 2137 | 2140 | Actual |
| 15 Gas | | | 2815 | 3380 | Actual plus 20% |
| 16 Garbage and Rubbish Removal | | | 672 | 670 | Actual |
| 17 Payroll | | | 1390 | 1390 | " |
| 18 Decorating | | | 1391 | 1390 | " |
| 19 Repairs | | | 5557 | 5560 | " |
| 20 Exterminating | | | 214 | 220 | " |
| 21 Insurance | | | 1471 | 1470 | Actual |
| 22 Ground Expense (Materials Only) | | | 8414 | 8450 | Actual |
| 23 Furniture and Furnishings | | | | | |
| 24. Misc | | | 1135 | 1140 | Actual |
| 25 | | | | | |
| 26 TOTAL OPERATING EXPENSES | 59 700 | | 48896 | 41220 | |
| 27 Reserve for Replacements | 5665 | | 4249 | 5670 | For Imp. Assessment |
| 28 Real Estate Taxes | | | 17935 | 24730 | For FULL |
| 29 Insurance | | | 695 | 700 | Actual |
| 30 Misc | | | 177 | 180 | Be Exact |
| 31 | | | | 1200 | Figures Rounded |
| 32 Net | | | | 34 | |

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

# RENTAL COMPUTATION FORM

| | |
|---|---|
| NUMBER OF UNITS 99 | PROJECT NUMBER 122-44537-C ? |
| NUMBER OF ROOMS 347 1/2 | NAME OF OWNER C-K |
| NUMBER OF GARAGES | PROJECT NAME MESLER PARK APTS |
| NUMBER OF STORES | LOCATION 960 W 5TH SAN PEDRO CALIF |

## SECTION I. VERIFICATION OF EQUIPMENT AND SERVICES INCLUDED IN RENT

(Check applicable items in each column)

| ITEM | A. PREV APPROVAL | B. EXISTING | C. APPROVED | ITEM | A. PREV APPROVAL | B. EXISTING | C. APPROVED |
|---|---|---|---|---|---|---|---|
| Ranges (Gas or Electricity) | ✓ | | | Electricity to Tenant | ✓ | | |
| Refrigerators (Gas or Electricity) | ✓ | | | Decorating | | | |
| Laundry Facilities | ✓ | | | Furniture | | | |
| Water (Hot or Cold) | ✓ | | | Other (Specify) | | | |
| Space Heat | ✓ | | | KITCHEN FAN D&C | ✓ | | |
| Gas to Tenant | ✓ | | | | | | |

## SECTION II. COMPARISON AND ALLOWANCE OF EXPENSES

| EXPENSE ITEM | A. FORM 2264 Dated ____ 19__ AMOUNT | B. USED FOR LAST RENT INCREASE Dated 9-6 19 24 AMOUNT | C. MORTGAGOR'S STATEMENT Dated ____ 19__ AMOUNT | D. ALLOWED Dated ____ 19__ AMOUNT | E. REMARKS |
|---|---|---|---|---|---|
| 1. Advertising | | 1010 | 1148 | 520 | TYPICAL |
| 2. Painting - Misc Commissions RENT | | | 781 | | |
| 3. Management | | | 8944 | | |
| 4. Resident Manager | | 12,220 | 1307 | 1400 | ACTUAL |
| 5. Clerical | | | 1148 | | |
| 6. Telephone and Telegraph | | | 455 | 460 | " |
| 7. Office Expense | | | 709 | | |
| 8. Legal and Audit | | 40 | 2380 | 1280 | " |
| 9. Elevator Power | | 2156 | | | |
| 10. Elevator Maintenance | | | 1303 | 1300 | " |
| 11. Heating and Ventilating (Maint) | | 120 | 1286 | 1370 | " |
| 12. Janitorial Expense (Materials) | | 140 | 1530 | | |
| 13. Lighting (Main Power) | | 11 990 | 8901 | 10,680 | " +20% |
| 14. Water | | 2140 | 2506 | 2760 | " +10 |
| 15. Gas | | 3380 | 3035 | 3640 | " +20 |
| 16. Garbage and Rubbish Removal | | 620 | 729 | 730 | " |
| 17. Payroll | | 1390 | 1530 | 1530 | " |
| 18. Decorating | | 1390 | 1530 | 1530 | " |
| 19. Repairs | | 5560 | 5953.23 | 5960 | " |
| 20. Extermination | | 220 | 216 | 220 | " |
| 21. Insurance | | 1470 | 1096 | 1100 | " |
| 22. Grounds Expense (Materials Only) | | 8450 | 7869 | 7270 | " |
| 23. Furniture and Furnishings | | | | | |
| 24. MISC | | 1040 | 63 | | |
| 25. PAINTING (Ext) | | | | 3600 | " |
| 26. TOTAL OPERATING EXPENSES | | 51,3480 | 51,954 | 49,50.00 | |
| 27. Reserve for Replacements | 5665 | 5670 | 5665 | 5670 | " |
| 28. Real Estate Taxes | | 24730 | 24,724 | 27320 | " |
| 29. Social Security Taxes | | 700 | 748 | 750 | " |
| 30. [illegible] | | 120 | 120 | 120 | " |
| 31. | | 24730 | | | |

WILLIAM D. KELLER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division

STEPHEN D. PETERSEN
Assistant U. S. Attorney
1100 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 688-3552

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Nov. 19, 1975]

No. CV 75-3009-JWC

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, Individually and as representatives of a class,
PLAINTIFFS,

*v.*

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, H. R. CRAWFORD, as Assistant Secretary for Housing Management of the United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the United States Department of Housing and Urban Development, and G & K MANAGEMENT CO., INC., and MEYLER PARK APARTMENTS, a Limited Partnership, DEFENDANTS.

## STIPULATION OF FACTS WITH RESERVATIONS

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiffs; G & K Management Co., Inc.,

and Meyler Park Apartments, private defendants; and Carla Hills, H. R. Crawford and Roland Canfield, federal defendants, by their respective counsel, that, for the purpose of trial or other hearings in the above-entitled cause, the facts hereinafter stated are undisputed, except as herein noted, and may be treated by the Court as facts proved in open court.

The parties may, on the trial of said cause, call witnesses and offer evidence for the purpose of proving such additional facts as the parties may see fit.

1. The plaintiffs Hilda Abrams, Greta Jaeger, and Margaret McEachin, hereinafter, "plaintiffs," are residents of the Meyler Park Apartments, each of whom pay more than twenty-five to thirty percent (25-30%) of their "adjusted family incomes" in rent.

*N.B.* The federal defendants do not join in Stipulation No. 1 as to plaintiffs Jaeger & McEachin for the reason that according to HUD's available records those plaintiffs pay approximately 25% of their "adjusted family incomes" in rent. The non-federal parties are submitting certain information to HUD in the hope that the Federal Defendants will join in Stipulation No. 1 fully and the Court will be advised.

2. The class which plaintiffs represent are residents of the Meyler Park Apartments, each of whom pay more than twenty-five to thirty percent (25-30%) of their "adjusted family incomes" in rent.

*N.B.* The federal defendants do not join in Stipulation No. 2 because of their belief that it states a conclusion of law.

3. "Adjusted family income" is determined by the federal defendants Carla Hills, H. R. Crawford, and Roland Canfield according to 24 C.F.R. 236.2 to be monthly gross income, including total income before taxes and other deductions, less five percent of monthly gross income and other deductions not listed herein.

4. Defendants Carla Hills, H. R. Crawford, and Roland Canfield, hereinafter "federal defendants," are officials of the United States Department of Housing and Urban Development, hereinafter, "HUD" and defendant Hills is responsible for the administration and enforcement of all

laws, regulations, powers, and duties relating to that Department, and particularly for the administration of Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1, *et seq.*

5. Defendants Meyler Park Apartments, a Limited Partnership, and G & K Management Company, Inc., hereinafter, "private defendants," are respectively, the owners and operators of the Meyler Park Apartments, a 99-unit Section 236 development in San Pedro, California.

6. The Housing and Urban Development Act of 1968 amended the National Housing Act by adding *inter alia* the Section 236 Program (12 U.S.C. § 1715z-1) which has as its stated purpose the reduction of rentals for lower income families.

7. The federal defendants are responsible for implementation of the Section 236 Program, including issuing rules and regulations pursuant thereto, making periodic interest payments on behalf of qualified mortgagors, and regulating project owners with respect to rent, rent increase procedures, and other operating procedures.

8. The National Housing Act was further amended by the Housing and Community Development Act of 1974, hereinafter, "HCDA, 1974," on August 22, 1974, adding Section 212(2)(3) and (3), hereinafter, "operating subsidy provisions," 12 U.S.C. § 1715z-1(f)(3) and (g).

9. The reserve fund referred to in Section 212(3) of HCDA, 1974; 12 U.S.C. § 1715z-1(g) was valued as of August 31, 1975 at thirty-eight million, three hundred ninety-three thousand, seven hundred twenty dollars ($38,393,720).

10. The reserve fund referred to in Section 212(3) 12 U.S.C. § 1715z-1(g) is available to the federal defendants for use as an operating subsidy.

*N.B.* The federal defendants do not join in Stipulation No. 10 because of their belief that it states a conclusion of law and incorrectly assumes that a Secretarial determination has been made pursuant to the statute.

11. The private defendants make monthly payments from all rentals collected from the residents at Meyler Park Apartments in excess of basic rent to the Secretary for crediting to the reserve fund. For the month ending

September, 1975, the private defendants paid $131.00 to the Secretary for such crediting.

*N.B.* While the federal defendants join in Stipulation No. 11 as to its factual content, it is, in their view, not material to the issues before the Court.

12. The estimated amount of the operating subsidy for September, 1975, for Meyler Park Apartment is $453.12.

*N.B.* The federal defendants do not join in Stipulation No. 12 because of their belief that is states a conclusion of law, incorrectly assumes that Secretarial determinations have been made pursuant to the statute, and it is therefore incorrect as a matter of fact, and finally, is not material to the matters before the Court.

13. The Meyler Park Apartments is a 99-unit lower-income housing complex in San Pedro, California, constructed and financed pursuant to Section 236, 12 U.S.C. § 1715z-1.

14. Tenants residing in projects qualified for Section 236 assistance, as the Meyler Park Apartments, pay twenty-five percent (25%) of their "adjusted family incomes" or "basic rent," whichever is greater, not to exceed "fair market rental".

15. Application for rent increases are submitted to HUD by owners of projects insured and mortgaged pursuant to Section 236, 12 U.S.C. § 1715z-1, and may be approved if they provide reasonable charges to tenants and a fair return to the mortgagor. Such increases must be for demonstrated and bonafide increases in operating expenses and taxes.

16. Plaintiffs began their occupancy at the Meyler Park Apartments in 1972 and 1973, paying rent at the initial rate of $105.32 per month. Their leases were first amended effective November 1, 1974, to increase the rent ten and eight-tenths percent (10.8%) to $116.00 per month. Said rent raise was attributed at least in part to increased utility costs and property taxes.

17. On or about May 29, 1975, private defendants notified plaintiffs of their intention to apply to HUD for approval of a second rent increase, attributing said increase, at least in part, to a "dramatic increase" in utility costs and an increase in property taxes.

18. On or about July 3, 1975, private defendants submitted to federal defendants the request for a rent increase, which was approved by the federal defendants because of the increased costs for all utilities, property taxes, and other operating costs.

*N.B.* The federal defendants do not join in Stipulation No. 18, however the federal defendants do agree that on or about July 3, 1975, the private defendants submitted to federal defendants the request for a rent increase, which was approved by the federal defendants because of increased costs, including in part increased costs in real estate taxes.

19. On or about July 28, 1975, plaintiffs were notified that the rent increase had been approved by the federal defendants and that effective September 1, 1975, their rent would be increased to $128.00 per month, a raise of ten and four-tenths percent (10.4%).

20. Plaintiffs requested private defendants to apply for additional assistance payments from the operating subsidy, and requested federal defendants to provide additional assistance payments under the operating subsidy program.

21. There have been increases in property taxes and utilities at Meyler Park Apartments since the date that the apartment complex may be determined to be fully occupied which have increased plaintiffs' rents by at least, if not more than, $12.00 per month, the amount of the present rent increase.

*N.B.* The federal defendants do not join in Stipulation No. 21, however the federal defendants do agree that during the relevant period of time there have been increases in plaintiffs' rent due in part to increases in property taxes and utility expenses at Meyler Park Apartments.

22. Federal defendants have not established an initial operating expense level for the Meyler Park Apartments, neither by February 18, 1975, nor until the present.

23. The federal defendants have not issued rules and regulations implementing the operating subsidy provision, nor have they accepted applications for additional assistance payments.

24. Federal defendants have not made additional assistance payments to private defendants.

25. As a result of the implementation of Transmittal Notice 24 which amends the Insured Project Servicing Handbook, 4350.1 (plaintiffs' Exhibit "W") the rate at which the reserve fund accrues has been affected.

*N.B.* The federal defendants do not join in Stipulation No. 25 for the reason that it states a conclusion of law. In federal defendants' view, Transmittal Notice 24 merely alters the definition of excess rental incomes.

26. The parties hereby agree that the following documents are in fact what they are purported to be and that no further foundational proof need be shown.

a. Plaintiffs' Exhibit "E".
b. Plaintiffs' Exhibit "F".
c. Plaintiffs' Exhibit "G".
d. Plaintiffs' Exhibit "J".
e. Plaintiffs' Exhibit "W".

27. Attached hereto is a copy of the most recent revision of Chapter 4, Section 3 of the HUD Insured Project Servicing Handbook, 4350.1 (a copy of an earlier revision is attached to plaintiffs' Complaint as Plaintiffs' Exhibit "G").

DATED: This 18th day of November, 1975.

WILLIAM D. KELLER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant U. S. Attorney
Chief, Civil Division

/s/ Stephen B. Petersen
STEPHEN B. PETERSEN
Assistant U. S. Attorney

Attorneys for Federal Defendants.

DATED: This 18th day of November, 1975.

/s/ Catherine M. Bishop
RONALD S. JAVOR
CATHERINE BISHOP
Attorneys for Plaintiff.

DATED: This 18th day of November, 1975.

AXELRAD, SEVILLA & ROSS

/s/ John G. Kerr
JOHN G. KERR
Attorneys for Private Defendants,
Meyler Park Apartments, G & K
Management, Co., Inc.

ATTACHMENT 1

INSURED PROJECT
SERVICING HANDBOOK

4350.1

CHAPTER 4, SECTION 3

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## CHAPTER 4. GENERAL MORTGAGE SERVICING

## SECTION 3. RENTS AND CARRYING CHARGES

1. INTRODUCTION. Prompt action by the Area Office Loan Management and Property Disposition Branch Director or the Insuring Office Management and Mortgage Servicing Section Chief to review rent schedules is of utmost importance since adequate income and prudent use of it are essential to the success of any project. The appropriate Area or Insuring Office loan management personnel must approve or disapprove all requests for rental rate increases within 30 days from the day received in the Office. If an Office is unable to meet this deadline, it shall prepare a memorandum, within the 30-day period, discussing the Office's inability to meet this deadline and explaining the reasons for the delay. This memorandum, signed by the Area or Insuring Office Director, shall be sent through the appropriate Regional Administrator to the Assistant Secretary for Housing Management, Attention: Director, Office of Loan Management.

2. COMMERCIAL RENTS.

   a. *Before initial occupancy*, the rents for all commercial space will be approved by HUD, but such rates shall constitute a floor rather than a ceiling. The objective is to determine that the rents proposed for such space are sufficiently in accord with those anticipated in processing to represent an economically sound rent. Thereafter, it is incumbent on HUD to see that economically sound rents are maintained.

b. *Should there be business reasons* which indicate the probable necessity for reducing commercial rents below the levels established in initial processing, a statement of facts and circumstances to justify a specific reduction shall be filed by the mortgagor with the Housing Management Division Director.

3. SHELTER RENTS. With the approval of HUD, a schedule of shelter rents must be established initially and maintained thereafter at levels that will provide reasonable charges to tenants and a fair return to the mortgagor. As a general rule, the objective in examining and approving a request for an increase in rent is to compensate for demonstrated increases in operating expenses and taxes and thus afford the prospect of a rate of return to the owner not in excess of the rate initially allowed. In the case of nonprofit mortgagors, a balanced budget rather than a net return is, of course, the primary consideration.

a. *Request for Rent Increase.*

(1) *A request for rent increase* should normally be accompanied by a current financial statement, but there are exceptions. (For example, an increase in an approved rental schedule that was originally less than the Area of Insuring Office could have approved at the date of initial occupancy requires only a request from the mortgagor setting forth that fact. In such instances, a new schedule may be approved without recalculation, provided such schedule does not exceed the maximum which could have been approved at initial occupancy.) Another exception would be where a rent adjustment was solely because the actual levying of real estate taxes or assessments was considerably in excess of the estimates used. In every such instance, the amount of the real estate taxes actually assessed against the property will be verified before a new rent schedule is approved.

(2) *Requests for rent increases* which would result in total rents in *excess of allowable rents* must be supported by a complete submission by the mortgagor, and will be subjected to careful examination. Such submissions should include:

(a) A formal written statement citing the basis for the request and including justification for any unusual items of expense as well as any unusual increases in regular expense items.

(b) A statement relating to the general condition of the property; the frequency of redecorating dwelling units; and itemization of existing equipment and services included in rents; existing and proposed apartment gross potential income (also stated in terms of average amounts per room per month); existing and proposed garage rents for commercial space, if any.

(c) A current financial statement covering a period of at least one year is desirable. However, when a mortgagor can foresee an annual deficit before the end of the accounting year, a rent increase can be considered based on monthly accounts which document the need for such an increase. (See chapter 5, sec. 1, par. 9(c).)

b. *Considerations Requisite to Examination.* No rent increase should be approved without consideration being given to the following:

(1) Any finding as to improper maintenance or serious violation under the Regulatory Agreement. If the property is not being properly maintained, there should be an undertaking on the part of the owner to meet minimum standards prescribed by HUD before final action is taken on the request for a rent increase.

(2) Similarly, an agreement must be reached between HUD and the owner with respect to any

finding of a violation under the mortgage or Regulatory Agreement before final action is taken on a request for a rent increase.

(3) Another important consideration could be the clearance of outstanding obligations not disclosed at the time of final closing.

c. *Examining Requests for Rent Increases.*

(1) *Approval or disapproval of requests* for rent increases is a responsibility of the Area or Insuring Office, except for Armed Services Housing. All requests shall be processed within 30 days from receipt as outlined in paragraph 1, Mortgagors shall be promptly notified in writing of approval or disapproval of their requests and, in the event of disapproval, the letter will cite the reasons for such disapproval.

(2) *Examination of requests for rent increases* follows an established pattern in most cases with certain deviations necessary when considering Section 221(d)(3), below-market interest rate projects, Housing for the Elderly projects, and projects covered by Secretary-Held (HUD-Held) mortgages. Procedures applicable to the latter are outlined in Handbook 4360.1. In most cases the primary concern is to approve a schedule with rates that are reasonable.

(3) *In determining maximum permissible rents,* Form HUD-92547, Rental Computation, will be used. Before proceeding with the actual computation, the request and supporting data submitted by the mortgagor should be examined for sufficiency. Where two or more continuous projects of the same characteristics are under the same ownership, computation for a rental increase may be consolidated on one Form HUD-92547. The word "mortgagor" mentioned in the instructions may be construed to mean "mortgagors," but variations

between the projects may require certain adjustments. In the event one project includes commercial space while the other does not, calculations of the operating expenses and total replacement cost must be made for the commercial space and deducted from the consolidated figures.

(a *Verification of Equipment and Services Included in the Rent.* Upon receipt of a request from a mortgagor, accompanied by required submissions, the equipment and services included in the rent will be compared with those contemplated at the time of original processing or at the time of the last rent increase. Any discrepancy will be reconciled or explained to the satisfaction of the Area or Insuring Office. There should be no objection to improving or increasing the equipment and services included in the rent, but any attempt to improve service standards for the purpose of obtaining disproportionate increase in rents must be discouraged. Conversely, any evidence of maintenance standards having been lowered should be reflected in the amounts allowed.

(b) *Comparison and Allowance of Expenses.*

*1.* Except for those cases where a rental schedule was approved for rents below maximum permissible rates, the only justification for a rent increase is a bona fide increase in operating expenses or real estate taxes. The allowable increases should be compared with expenses allowed when the most recent rent increase was computed, or with Form No. 2264 when there has been no previous rent increase.

2. All items of expense should be entered in the spaces provided under Section II of Form HUD-92547. Column A should identify by date the particular Form No. 2264 used in the final determination of the amount of the insured mortgage, and should set forth the identical expense data used in determining the original.

EXHIBIT "J"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, individually and as representatives of a class
PLAINTIFFS

*v.*

CARLA HILLS, H. R. CRAWFORD, ROLAND CANFIELD (U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT), G&K MANAGEMENT, CO., MEYLER PARK APARTMENTS, LTD., DEFENDANTS

Civil Action No. 75-3009

## AFFIDAVIT OF ALBERT J. KLIMAN

Albert J. Kliman, being duly sworn, deposes and says:

1. I am the Director of the Office of Budget of the Department of Housing and Urban Development. In that capacity I serve as the adviser to and representative of the Assistant Secretary for Administration in matters relating to budget formulation and execution, and as adviser to the Secretary and Under Secretary with respect to these matters. I am responsible for the development of budget plans, policies and procedures, and for the overall supervision of the Office of Budget. The principal responsibilities of the Office of Budget are:

(a) To advise the Assistant Secretary for Administration and other high level officials of the Department including the Secretary and Under Secretary on budget matters, including the budgetary implications of policy and legislative proposals;

(b) To advise Assistant Secretaries and staff officers on their budgetary responsibilities, to evaluate the effectiveness of these activities and to exercise technical and functional supervision with

respect to all budget activities throughout the Department; and

(c) To prepare or review all consolidated or Department-wide budget estimates for submission to Office of Management and Budget and the Congress.

2. It is the purpose of this affidavit to state the manner in which the Congres has made available contract authority and appropriated funds to carry out the provisions of Section 236 of the National Housing Act as amended. It is also the purpose of this affidavit to state how the Department has programmed the unreserved balance of contract authority made available by Congress to carry out the Section 236 program.

3. "Contract authority," as used in this affidavit, refers to the means by which contracts are entered into under statutory authority which provides for a commitment of Federal fund payments, now and in the future, up to a stipulated limit, prior to an appropriation of funds for the liquidation of such contracts. With respect to the Section 236 program, contract authority permits the Department to enter into contracts to make annual payments, such as interest reduction payments, which are authorized by Section 236 of the National Housing Act, as amended, for certain future periods. Congress makes contract authority available under the Section 236 program through a two step process. First, there must be an authorization of contract authority contained in the substantive legislation. Second, the contract authorization, or portion thereof, must be released to the Department in an appropriations act. The Department may then enter into contracts to make annual payments authorized by Section 236 up to the limit established in the appropriations act releasing such contract authority.

4. "Appropriation," as used in this affidavit, refers to an authorization in an appropriations act to draw funds from the Treasury for specified purposes and to make disbursements of these funds. With respect to the Section 236 program, appropriations provide the Department with funds to liquidate contracts for payments au-

thorized by Section 236 of the National Housing Act, as amended, which were entered into pursuant to contract authority released by Congress for that purpose.

5. Congress has released no contract authority specifically for contracts for the payment of operating subsidies authorized by Section 236(f)(3) and (g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974. Section 236(i) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, authorized $75,000,000 of contract authority, subject to release in appropriations acts, to carry out the provisions of Section 236 of the National Housing Act, as amended, in Fiscal Year 1975. However, the Congress has released no contract authority in an appropriations Act pursuant to this authorization.

6. Although Congress has released no new contract authority for the Section 236 program, it has authorized the Department to use the contract authority it currently has available to carry out the provisions of Section 236 of the National Housing Act, as amended, to enter into contracts for the payment of Section 236 operating subsidies. See: Senate Report No. 93-1255, accompanying H.R. 16900, 93d Cong., 2d Sess., October 9, 1974, and H. Rpt. No. 93-1503, accompanying H.R. 16900, 93d Cong., 2d Sess., November 26, 1974.

7. As of July 31, 1975, the Department had an unreserved balance of contract authority in an amount aggregating $120,151,891 for contracts authorized by Section 236 of the National Housing Act, as amended. The distribution of the unreserved balance is currently under review in connection with the preparation of the Fiscal Year 1977 Budget. No specific distribution has been made. However, the Department has about $65 million of this contract authority set aside for bona-fide commitments. The balance is expected to be committed by the Department for (1) amendments to contracts for the payment of interest reduction payments on State-aided projects as authorized by Section 236(h) of the National Housing Act, as amended; and (2) "deep subsidies" mandated by Section 236(f)(2) of the National Housing Act,

as amended by Section 212 of the Housing and Community Development Act of 1974.

8. Section 236(g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, provides that Section 236 project owners shall periodically pay to the Secretary all rental charges collected in excess of basic rental charges and that these excess rental charges shall be placed in a reserve fund by the Secretary. This section goes on to state that the Secretary may use the excess rental charges in the reserve fund to make operating subsidy payments to project owners by crediting the reserve funds to the appropriation authorized by Section 236(i), as amended. Section 236(i), as amended, in addition to authorizing appropriations to carry out the Section 236 program, provides that the Secretary has no more contract authority than that granted by appropriations acts. Therefore, the Department can use the $37,823,293 balance in the reserve fund, as of August 31, 1975, for the payment of operating subsidies *only* to the extent that there exists sufficient unreserved contract authority released by Congress for that purpose. However, as is indicated in paragraph 7, the Department plans to commit its entire unreserved balance of contract authority for purposes other than contracts for the payment of operating subsidies.

/s/ Albert J. Kliman
ALBERT J. KLIMAN
Director, Office of Budget

Subscribed and sworn to before me on this 8th day of October, 1975.

/s/ BERNARD E. BANKS
Notary Public
My Commission Expires
June 30, 1976

EXHIBIT "K"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-3009

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, individually and as representatives of a class
PLAINTIFFS

*v.*

CARLA HILLS, H. R. CRAWFORD, ROLAND CANFIELD (U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT), G&K MANAGEMENT, CO., MEYLER PARK APARTMENTS, LTD., DEFENDANTS

## AFFIDAVIT OF H. R. CRAWFORD

H. R. Crawford, being duly sworn, deposes and says:

1. I am the Assistant Secretary for Housing Management of the Department of Housing and Urban Development (HUD), and as such, I have responsibility pursuant to a delegation of authority from the Secretary published at 36 F.R. 5005, as amended, for all housing management functions of HUD, including all management activities under the National Housing Act, as amended.

2. The Department is extremely concerned with the problems threatening the economic viability of HUD insured and subsidized multifamily housing projects as well as the financial burdens imposed upon the low- and moderate-income tenants of these projects who must pay higher rents to meet the continuing rise in operating costs. Sharp rises in property taxes, utility rates and the cost of other goods and services essential to the operation of multifamily housing projects have brought about an alarming acceleration in the rate of defaults in mortgage payments by the owners of such projects. It is the position of the Department that a broad strategy, which will

address itself to the problems of all HUD assisted multifamily projects, is necessary to alleviate what has become a financial crisis.

3. The operating subsidy provisions of Section 212 of the Housing and Community Development Act of 1974 is an attempt by the Congress to address the problem of increased operating costs in Section 236 projects by providing additional subsidies to the project owner. However, Section 212 does not authorize additional assistance for HUD assisted multifamily projects insured under other sections of the National Housing Act which face identical problems.

4. Section 212 of the Housing and Community Development Act of 1974 authorizes the payment of operating subsidies to Section 236 project owners only to the extent necessary to maintain the basic rental charges for tenants at levels not in excess of 30 percent of their gross income. Therefore, the benefit of operating subsidies flows only to those Section 236 projects which are occupied by tenants whose basic rental charge exceeds 30 percent of their gross income. There are Section 236 projects in which a majority or all of the tenants occupying its units pay a rental charge which does not exceed 30 percent of their gross income. Consequently, the payment of operating subsidies will have little or no ameliorating effect upon the economic difficulties threatening the owners of a number of Section 236 projects.

5. The payment of operating subsidies solely to Section 236 project owners, therefore, is inequitable in providing relief only to a small proportion of HUD assisted multifamily projects and to an even smaller group of beneficiaries—those owners of Section 236 projects whose tenants have a basic rental charge exceeding 30 percent of gross income. In view of the need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD assisted multifamily projects, the Department is currently considering a number of alternative proposals for solutions that are more comprehensive and more equitable.

6. There are two basic approaches to affect the cash flow problems facing multifamily projects without raising

the rental charges that the tenants must pay. The first is to provide additional subsidies for the projects to increase operating income. This approach does not affect the amount of the mortgagor's debt service payments. The other option is to decrease the debt service on the mortgage thereby freeing additional income for the operation of the project. There are a number of alternative methods to achieve the goals of each of these options. Some of the alternatives currently being considered by the Department are as follows:

(a) A policy whereby mortgages are assigned to HUD and then recast to require a payment of principal and interest based upon current and foreseeable project income. The balance of the principal would not become due until the expiration date of the original indebtedness;

(b) A policy whereby Section 8 units, authorized by the Housing and Community Development Act of 1974, would be allocated to distressed multifamily projects, thereby providing a base of rental income for the project which would rise with inflationary cost increases as they are sustained, and not affect the rent the tenants must pay;

(c) A policy which permits Section 236 project owners to offset rents collected in excess of the basic rental charge against uncollected rents as a cushion against increased operating costs. Consideration is also being given to making this procedure retroactive for the excess rental collections which have been remitted to HUD pursuant to Section 236(g) of the National Housing Act, as amended;

(d) A policy permitting extensions in the maturity date of the mortgage, thereby decreasing the project's debt service payments;

(e) A policy which permits the transfer of nonprofit projects to limited distribution ownership to improve management, i.e., management which is motivated by existing benefits available to owners of subsidized projects;

(f) A policy which authorizes an increase in the tenant income limits for subsidized projects which, coupled with the increased use of rent supplements, would provide an increase in rental income while at the same time cushioning the impact of increased operating costs on lower income tenants; and

(g) A legislative proposal to permit payment of a partial insurance claim (out of the insurance fund established by Section 238 of the National Housing Act, as amended) to the project owner which would reduce his mortgage indebtedness to a monthly amortization which he can afford to pay out of current income. A second note mortgage for the amount of the insurance claim paid would be held by HUD and be repayable under terms consisting of favorable interest rates and a deferred start of amortization.

7. *A Multifamily Defaults Study* was undertaken within the Department at the request of former HUD Secretary James T. Lynn. This study probed many of the alternatives currently being considered by the Department to alleviate the default problem in HUD assisted multifamily projects and evaluated the potential effectiveness of each alternative proposal. In addition, the Department helped launch a $700,000 research and demonstration effort to gain new insight and answers to problems besetting some 60 financially troubled multifamily housing projects in the New York City area. These projects contain 16,500 dwelling units and represent mortgages totaling almost $370 million.

8. Earlier in the year, the Department announced a temporary suspension of further referrals to the Department of Justice of additional foreclosures of HUD subsidized multifamily projects owned by nonprofit and limited dividend mortgagors, except in the case of abandonment or similar circumstances. In an effort to obtain the views of all interested public and private sources concerning HUD's policies on defaults in all HUD subsidized multifamily projects and the impact of defaults upon

the low- and moderate-income tenants residing in such projects, the Department held public hearings on May 5 and 6, 1975. These hearings were designed to solicit the proposals of tenant groups, project owners and other representatives of the community at large on alleviating the default problem so that these proposals can be added to those currently being considered by the Department.

9. While the Department is engaged in examining the potential effectiveness of alternative proposals designed to alleviate the financial difficulties of all HUD insured and subsidized multifamily projects and the adverse impact of these difficulties upon the tenants of such projects, it has no plans to implement the provisions of Section 236(f)(3) and (g) of the National Housing Act, as amended, which authorize the payment of operating subsidies to Section 236 project owners. It is the position of the Department that the alternative proposals currently being considered provide a broader approach to the economic difficulties threatening multifamily project owners as well as the tenants of such projects.

10. Secretary Hills, Under Secretary Mitchell and I appeared before the Senate Committee on Appropriations on April 21 and 22, 1975. At these hearings, the intent of the Department not to implement the statutory authority to pay operating subsidies to Section 236 project owners, at this time, was made clear to the committee. The committee was concerned with options being considered by the Department to alleviate the multifamily default problem as well as the financial difficulties threatening the tenants of these projects. The Secretary, the Under Secretary and I discussed some of the alternatives being considered by the Department as well as some of the methods proposed for their implementation. I also appeared before the Subcommittee on HUD and Other Independent Agencies of the House Committee on Appropriations at hearings held on April 14 through 18, 1975. At these hearings, the Subcommittee was informed of the Department's intent with respect to the implementation of the statutory authority to pay operating subsidies under the Section 236 program. Departmental spokesmen will continue to keep those committees fully informed concern-

ing the progress made in the development of alternative solutions and the possible need for legislation in this area.

11. On July 29, 1975, the Department published an Interim Rule at 40 F.R. 31873, implementing the new Section 236(f)(2) of the National Housing Act. This regulation will provide additional rental assistance payments to a Section 236 project for tenants who cannot afford to pay the basic rental charge with 25 percent of their income. Rental assistance payments to eligible projects will normally be made available to 20 percent of the dwelling units. This Interim Rule was effective upon publication and the Department has provided a 60 day period for interested persons to file comment before adopting a final rule.

12. Pursuant to the request of the Secretary, I estimated the minimum amount of funds necessary to make operating subsidy payments to all Section 236 projects under management in Fiscal Year 1976, which commences July 1, 1975. Based upon calculations made by members of my staff, I estimated that it would cost approximately $4.3 million per month or $51.4 million per year to implement the operating subsidy program for all Section 236 projects under management in Fiscal Year 1976. The balance in the reserve fund established by Section 236(g), as amended, was $37,823,293 as of August 31, 1975.

13. Section 236(g) of the National Housing Act, as amended, provides that during any period that the Secretary determines that the balance in the reserve fund, established by Section 236(b), is adequate to meet the estimated operating subsidy payments, as authorized by Section 236(f)(3), the amount in the reserve fund shall be credited to the appropriation authorized by Section 236(i) and be available until the end of the next fiscal year (FY 1976) for the purpose of making operating subsidy payments. The Secretary has not determined that the balance in the reserve fund is sufficient to meet the

estimated operating subsidy payments for the more than 3,650 Section 236 projects under management.

/s/ H. R. Crawford
H. R. CRAWFORD
Assistant Secretary
for Housing Management

Subscribed and sworn to before me on this 8th day of October, 1975.

/s/ Bernard E. Banks
Notary Public
My Commission Expires

June 30, 1976

EXHIBIT "N"

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-3009

HILDA ABRAMS, ET AL., PLAINTIFFS,

*v.*

CARLA HILLS, ET AL., DEFENDANTS.

## AFFIDAVIT OF ABNER SILVERMAN

Abner Silverman, being duly sworn, deposes and says:

1. I am the Counselor to the Assistant Secretary for Housing Management of the Department of Housing and Urban Development (HUD). In the absence of the Assistant Secretary, and the Deputy Assistant Secretary, for Housing Management I assume the position of Acting Assistant Secretary for Housing Management. Pursuant to a delegation of authority published at 36 F.R. 5005, as amended, the responsibilities of the Assistant Secretary for Housing Management encompass all of the Department's housing management functions including all management activities under the National Housing Act.

2. The purpose of this affidavit is to supplement the Affidavit of Mr. Albert J. Kliman, previously submitted to this Court, with respect to the excess rental reserve fund established by Section 236(g) of the National Housing Act, as amended. It is also the purpose of this affidavit to bring to the Court's attention the facts surrounding the Department's decision to refund to certain owners of projects insured under Section 236 of the National Housing Act, a substantial portion of the sums previously derived from them and presently credited to the excess rental reserve fund established by Section 236(g) of the National Housing Act, as amended.

3. The Affidavit of Mr. Kliman stated that the excess rental reserve fund contained $37,823,293.00 as of August 31, 1975. As of October 31, 1975, the excess reserve fund contained $40,647,789.00. No mention was made in Mr. Kliman's Affidavit of a potential charge upon the balance in the excess rental reserve fund. The potential charge on the excess rental reserve fund is explained below.

4. Section 236 was added to the National Housing Act in 1968 to encourage private enterprise to engage in the development of good rental and cooperative housing for lower income families. It authorizes the provision of mortgage insurance and assistance in the form of periodic subsidy payments to an eligible mortgagee in order to reduce the mortgagor's interest costs on a market rate FHA-insured project mortgage down to one percent per annum. The interest subsidy, in turn, makes possible lower rentals to be paid by those occupants who qualify for Section 236 assistance. The rent a tenant must pay is derived through the use of two principles: The "basic rental charge" and the "fair market rental charge". The former is determined on the basis of operating the project with payments of principal and interest due under a mortgage bearing interest at the rate of 1 percent per annum. The latter is determined on the basis of operating the project with payments of principal, interest, and mortgage insurance premium which the mortgagor is obligated to pay under the mortgage.

A qualified tenant must pay the "basic rental charge" or 25 percent of his adjusted income, whichever is greater. However, in no case will a tenant's rental payment exceed the "fair market rental charge".

5. Prior to the 1974 amendments to Section 236, Section 236(g) provided that project owners, "shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be deposited by the Secretary in a fund which may be used by him as a revolving fund for the purpose of making interest reduction payments. . . ."

6. This statutory requirement was inserted into the "regulatory agreement" which constitutes a contract between HUD and the project owner (mortgagor) for Section 236 assistance. Each regulatory agreement provides in pertinent part that the project owner shall remit each month to the Department, together with the appropriate reporting form, the amount by which the total rentals collected on the dwelling units exceed the sum of the approved basic rentals for all occupied units. Project owners are required to remit excess rentals to the Department along with HUD Form 3104, "Monthly Report of Excess Income". (Exhibit A) Instructions for calculating such excess rents were set forth in HUD's Insured Project Servicing Handbook.

7. In the latter part of 1973, it came to the attention of HUD's Office of Loan Management, the office responsible for implementing Section 236(g), that a great deal of uncertainty existed on the part of Section 236 project owners concerning the computation of excess rentals. After a review, which began in early 1974, the Office of the Assistant Secretary for Housing Management determined that the manner in which most project owners were computing excess income was not consistent with the statutory requirement as set forth in the regulatory agreement. Because of insufficient instructions accompanying HUD Form 3104, project owners had been making monthly computations of excess rents on a noncumulative basis which provided no offset for rents not collected in prior months. As a result of these miscalculations, project owners were erroneously remitting to HUD amounts in excess of the amounts due under the statutory requirement. The following example is instructive in demonstrating the manner in which this inequitable situation arose:

| Basic Rent | Tenant Owes | (Cumulative) Excess, If Any | Actual Rent Collected |
|---|---|---|---|
| **First Month** | | | |
| 120 | 150 | 30 | 150 |
| 100 | 100 | — | 100 |
| 110 | 120 | 10 | — |
| 120 | 130 | 10 | — |
| 450 | 500 | 50 | 250 |
| **Second Month** | | | |
| 120 | 150 | 60 | 150 |
| 100 | 100 | — | 100 |
| 110 | 240 | 20 | 240 |
| 120 | 260 | 20 | 260 |
| 450 | 750 | 100 | 750 |

As set forth in this chart, two tenants were delinquent in payment of their rent for the first month. This delinquency, however, was made up in the second month as a result of the payment of two months rent by the two delinquent tenants. In the second month, the project owner collected rents in the amount of $750, some $300 in excess of the sum of the basic rents ($450) for that month. With no allowable offset for rents not collected in the first month, a project owner would be required to remit $300 in excess rents to HUD. However, with the benefit of such an offset, the actual amount required to be remitted to HUD in the second month is $100, which equals the aggregate amount collected in excess of basic rents for the first and second months.

8. The Department determined that the excess rental requirement contained in Section 236(g), properly interpreted, requires a project owner to utilize a method of computation of excess rentals which allows an offset for rents not collected in prior months. In June 1975, final clearance was given to Transmittal No. 24 (Exhibit B), which revised HUD's Insured Project Servicing Handbook to provide the following formula for calculating excess rents:

Total month's rent collections
Less basic rents for all occupied units
Less collection losses
Will equal excess rents

In that same month, HUD Form 3104 was revised to clarify the formula for calculating excess rents. Revised Form 3104 (Exhibit C), provides for a loss incurred in one month to be carried forward so that it offsets actual rent collected in following months. This revised Form 3104 does not represent a new procedure for calculating excess rentals, but rather a clarification of the procedure which project owners should have been utilizing since the inception of the Section 236 program.

9. As a result of this clarification of the procedure for compliance with Section 236(g), a project owner now remits only the amount of excess rents properly computed as required by statute. However, no provision has yet been made to compensate a project owner for excessive payments previously remitted to HUD prior to June 1975. I have been advised by the Office of General Counsel that the Department is legally obligated to refund overpayments erroneously remitted by a project owner as a result of an incorrect interpretation of the requirements of Section 236(g) and the regulatory agreement. On the basis of this legal opinion, the Department has developed and is preparing to implement a procedure for refunding excess rentals erroneously remitted by making the formula set forth in revised Form 3104 and Transmittal No. 24 retroactive to the date that each project owner began remitting excess rentals to HUD. The Department estimates that approximately $18 million is necessary to make these refunds.

10. On August 22, 1974, Congress enacted the Housing and Community Development Act of 1974. Section 212 of that Act amends Section 236(g) of the National Housing Act to provide that excess rentals shall be credited to a reserve fund which is available to make operating subsidy payments authorized by subsection (f)(3). This statutory provision states that, during any period that

the Secretary determines that the balance contained in the reserve fund is sufficient to meet estimated operating subsidy requirements, it shall be credited to appropriations authorized by Section 236(i) and be available until the end of the next fiscal year for the purpose of making operating subsidy payments. As set forth in the Affidavit of H.R. Crawford, previously submitted to this Court, the Secretary has not made such a determination for the following reasons:

> (a) the Department has estimated that it will require an amount aggregating $4.3 million per month or $51.4 million per year to meet nationwide operating subsidy requirements for Fiscal Year 1976; and (b) the amount contained in the reserve fund as of August 31, 1975, was $37,823,293.00 (now $40,647,789.00 as of October 31, 1975).

11. In view of the fact that there is a charge upon the reserve fund for the sums necessary to refund excess rentals erroneously collected prior to June 1975, the Secretary cannot determine as a ministerial act that the balance is sufficient to meet estimated operating subsidy requirements for Fiscal Year 1976. Although the Department has estimated that $18 million will be required to make such a refund, the precise amount required, which can only be accurately determined after project owners submit the necessary financial records, may exceed the $18 million estimate.

/s/ Abner D. Silverman
ABNER SILVERMAN

Subscribed and sworn to before me on this 2nd day of February, 1976.

/s/ Illegible
Notary Public
My Commission Expires
Nov. 14, 1980

ADDENDUM B

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Filed Dec. 19, 1975]

Civil Action No. 75-3009 JWC

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, individually, and as representatives of a class, PLAINTIFFS,

*vs.*

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, H. R. CRAWFORD, as Assistant Secretary for Housing Management of the United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the United States Department of Housing and Urban Development, and G & K MANAGEMENT CO., INC., and MEYLER PARK APARTMENTS, a Limited Partnership, DEFENDANTS.

SECOND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN RESPONSE TO THE COURT'S REQUEST OF DECEMBER 4, 1975

The above entitled cause came on Plaintiffs' motion for summary judgment and this Court having duly considered the memoranda of law, affidavits, and exhibits, and being fully advised, now finds the following:

## FINDINGS OF FACT

1. The Plaintiffs, HILDA ABRAMS, GRETA JAEGER and MARGARET McEACHIN, hereinafter "Plaintiffs," are residents of the MEYLER PARK APARTMENTS, each of whom pay more than twenty-five to thirty percent (25-30%) of their "adjusted family incomes" in rent.

2. The class which Plaintiffs represent are past, present and future residents of the Meyler Park Apartments, each of whom pay more than twenty-five to thirty percent (25-30%) of their "adjusted family incomes" in rent.

3. Defendants MEYLER PARK APARTMENTS, a Limited Partnership, and G & K MANAGEMENT COMPANY, INC., hereinafter, "private Defendants," are respectively, the owner and operators of the MEYLER PARK APARTMENTS, a 99-unit Section 236 development in San Pedro, California.

4. Defendants CARLA HILLS, H. R. CRAWFORD, and ROLAND CANFIELD, hereinafter "federal Defendants," are officials of the United States Department of Housing and Urban Development, hereinafter "HUD." Defendant Hills has overall responsibility for the administration and enforcement of all laws, regulations, powers and duties pertaining to the operation of HUD and including the administration of the Section 236 program. Defendant CRAWFORD is responsible, under the authority delegated to him by Defendant Hills, for the management of housing projects constructed under the National Housing Act and including Section 236 housing projects. Defendant CANFIELD is responsible, under the authority delegated to him by Defendant Hills, for the administration and enforcement in Southern California of laws, regulations and procedures of HUD, in particular all those applicable to the Section 236 program.

5. The Section 236 housing program is a part of the National Housing Act, added by the Housing and Development Act of 1968 and designed for the purpose of reducing rentals of low-income families who cannot otherwise afford decent housing.

6. The federal Defendants are responsible for implementation of the Section 236 program, including issuing rules and regulations pursuant thereto, making periodic interest payments on behalf of qualified mortgagors, and regulating project owners with respect to rent, rent increase procedures, and other operating procedures.

7. The National Housing Act was further amended by the Housing and Community Development Act of 1974, hereinafter HCDA 1974, on August 18, 1974, adding Section 212(2)(3) and (3), hereinafter operating subsidy provisions.

8. The reserve fund referred to in Section 212(3) is available to federal Defendants for use as an operating subsidy and was valued as of August 31, 1975 at thirty eight million, three hundred ninety-three thousand, seven hundred twenty dollars ($38,393,720.00).

9. Other funds for the implementation of the operating subsidy provision were appropriated on September 6, 1974, and such funds have not been entirely spent or obligated.

10. The MEYLER PARK APARTMENTS is a 99-unit lower-income housing complex in San Pedro, California, constructed and financed pursuant to Section 236.

11. Qualified tenants in MEYLER PARK APARTMENTS pay no more than twenty-five percent (25%) of their "adjusted family incomes" for rent up to "fair market value," or pay "basic rent," computed on the basis of the amortized mortgage, and operating costs, and approved by federal Defendants.

12. Applications for rent increases are submitted by the private Defendants to the federal Defendants and are approved if they provide reasonable charges to tenants and a fair return to the mortgagor. Such increases must be for demonstrated and bona fide increases in operating expenses and taxes, and sources of funds other than tenants' rent must be maximized.

13. Plaintiffs began their occupancy at the MEYLER PARK APARTMENTS in 1972 and 1973, paying rent at the initial rate of $105.32 per month. Their leases were first amended effective November 1, 1974 to increase the rent ten and eight-tenths percent (10.8%) to $116.00 per month. Said rent raise was attributed at least in part to increased utility costs and property taxes.

14. On or about May 29, 1975, private Defendants notified Plaintiffs of their intention to apply to HUD for approval of a second rent increase, attributing said increase, at least in part, to a dramatic increase in utility costs and an increase in property taxes.

15. On or about July 1, 1975, private Defendants submitted to federal Defendants the request for a rent increase, which was approved by the federal Defendants because of the increased costs for all utilities, property taxes, and other operating costs.

16. On or about July 28, 1975, Plaintiffs were notified that the rent increase had been approved by the federal Defendants and that effective September 1, 1975, their rent would be increased to $128.00 per month, a raise of ten and four tenths percent (10.4%).

17. An increase in plaintiffs' rent at time of twelve dollars (12.00) monthly will result in grave hardship to plaintiffs and a threat of eviction due to their inability to pay the increased rent and severe difficulty in providing themselves with the necessities of life from their disposable incomes.

18. Plaintiffs requested private Defendants to apply for additional assistance payments from the operating subsidy, and to federal Defendants to provide additional assistance payments under the operating subsidy program.

19. There have been increases in property taxes and utilities at MEYLER PARK APARTMENTS since the date that the apartment complex may be determined to be fully occupied which have increased Plaintiffs' rents by at least, if not more than twelve dollars ($12.00) per month, the amount of the present rent increase.

20. Pursuant to the operating subsidy provision, private Defendants are eligible to receive additional assis-

tance payments on behalf of the Plaintiffs and the class they represent.

21. Federal Defendants have not established an initial operating expense level for the MEYLER PARK APARTMENTS, neither by February 18, 1975, not until the present.

22. The federal Defendants have not issued rules and regulations implementing the operating subsidy provision, nor have they accepted applications for additional assistance payments.

23. Federal Defendants have not made additional assistance payments to private Defendants.

24. Contrary to the statute, the federal Defendants are no longer requiring the private Defendants, and all of the Section 236 project owners, to return to the federal Defendants all rent collected in excess of basic rent.

25. Transmittal Notice 24, which amends the Insured Project Servicing Handbook, 4350.1, issued by the federal Defendants permits the private Defendants and all other Section 236 project owners to subtract from total rents collected the basic rents and in addition collection losses.

26. As a result of the implementation of this regulation, the reserve fund from which operating subsidies must be paid is no longer accruing at the maximum rate.

27. This regulation is contrary to the HCDA 1974, and frustrates the purposes and intent of the operating subsidy provision.

28. The federal Defendants are also contemplating using the reserve fund for additional purposes other than the operating subsidy.

29. The federal Defendants may not use the reserve fund for purposes other than the implementation of the operating subsidy unless the reserve fund is adequate to meet the estimated need for such additional assistance payments. If the reserve fund is adequate to meet the needs of the operating subsidies, then the excess charges from the reserve fund shall be credited to the appropriation for the Section 236 program.

30. Private Defendants' request for a rent increase was submitted and approved in violation of the rules and

regulations of the federal Defendants. The requested increase was not considered in light of the applicability and the private Defendants' eligibility for the operating subsidy. Thus the costs justifying the rent increase were not demonstrated or bona fide.

31. The matter in controversy exceeds the sum of $10,000.00 for each Plaintiff, exclusive of interest and costs, in that the difference between the amount of rent Plaintiffs pay and the fair market value of their units when spread over the life of the mortgage represents a value to each Plaintiff exceeding ten thousand dollars ($10,000.00).

## CONCLUSIONS OF LAW

1. In all respects set forth in the foregoing Findings of Fact:

2. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331, 1337, 1361, and 5 U.S.C. § 702. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of Fed. R.Civ.Pro. and by 5 U.S.C. § 703.

3. The Court has jurisdiction over the parties to this action.

4. The Plaintiffs, pursuant to Rule 23(a) and (b)(2) of Fed.R.Civ.Pro. are representatives of a class of persons residing in MEYLER PARK APARTMENTS who have been paying, and will in the future pay, a basic rent pursuant to 12 U.S.C. § 1715-z-1 of more

ORDERED that:

1. This Court properly has jurisdiction over this action under 28 U.S.C. §§ 1331, 1337, 1361 and 5 U.S.C. § 702. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of Federal Rules of Civil Procedure and by 5 U.S.C. § 703.

2. The class of persons herein which Plaintiffs represent is certified as those tenants of MEYLER PARK APARTMENTS who pay basic rent as defined in 12 U.S.C. § 1715z-1 which exceeds twenty-five percent (25%) of their "adjusted family income" for rent.

3. The Defendants, Hills, Crawford and Canfield, hereinafter federal Defendants, are hereby ordered to immediately implement Section 212(2)(3) and (3) of the Housing and Community Development Act of 1974, hereinafter operating subsidy provision, by establishing for MEYLER PARK APARTMENTS an initial operating expense level, and making additional assistance payments to the Defendants MEYLER PARK APARTMENTS, Ltd., and G & K MANAGEMENT CO., INC., hereinafter private Defendants, for any increases in rentals attributable to the excess of the sum of the cost of reasonable and comparable property taxes and utilities over the initial operating expense level provided that such payments shall not reduce the rent for any unit below twenty-five to thirty (25-30%) of Plaintiffs' and of the class they represent, "adjusted family income," and that such payments shall be made retroactive to February 18, 1975.

7. Plaintiffs are entitled to costs of this action as against the federal Defendants.

Further ordered:

This Court will retain jurisdiction over the parties herein to insure that this Order is properly effectuated.

DATED: Dec. 19, 1975

/s/ Judge J. W. Curtis
JUDGE J. W. CURTIS
United States District Court
Central District, California

Filed 1/26/76

Taxed costs in sum of $122.35, against Illegible

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-3009-JWC

[Filed May 19, 1976]

HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHINE, individually, and as representatives of a class,
PLAINTIFFS,

*v.*

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, et al.,
DEFENDANTS.

## SUMMARY JUDGMENT

In accordance with the findings of fact and conclusions of law made by this court, the plaintiffs' motion for summary judgment is hereby granted.

1. The class of persons herein which plaintiffs represent is certified as past, present and future tenants of Meyler Park Apartments who pay basic rent as defined in 123 U.S.C. § 1715z-1 which exceeds twenty-five to thirty percent (25%-30%) of their "adjusted family income" for rent.

2. The defendants, Hills, Crawford, and Canfield, hereinafter federal defendants, are hereby ordered to immediately implement Section 212(2)(3) and (3) of the Housing and Community Development Act of 1974, hereinafter operating subsidy provision, by establishing for Meyler Park Apartments an initial operating expense level, and making additional assistance payments to the defendants Meyler Park Apartments, Ltd. and G & K Management Co., Inc., hereinafter private defendants, for any increases in rentals attributable to the excess of the sum of the cost of property taxes and utilities over the initial operating expense level provided that such payments shall not reduce the rent for any unit below twenty-five to thirty percent (25%-30%) of plaintiffs' and of the

class they represent, "adjusted family income," and that such payments shall be made retroactive to February 18, 1975.

3. Plaintiffs are entitled to costs of this action as against the federal defendants.

FURTHER ORDERED:

This court will retain jurisdiction over the parties herein to insure that this order is properly effectuated.

DATED: May 19, 1976

/s/ Jesse W. Curtis
JESSE W. CURTIS
United States
District Judge

SUPREME COURT OF THE UNITED STATES

No. 76-1234

PATRICIA R. HARRIS, Secretary of Housing and Urban Development, et al., PETITIONERS,

*v.*

BARBARA ROSS, et al.

ORDER ALLOWING CERTIORARI. Filed May 23, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is consolidated with No. 76-1261 and a total of one hour is allotted for oral argument.

# SUPREME COURT OF THE UNITED STATES

No. 76-1261

PATRICIA R. HARRIS, Secretary of Housing and Urban Development, et al., PETITIONERS,

*v.*

HILDA ABRAMS, et al.

ORDER ALLOWING CERTIORARI. Filed May 23, 1977.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with No. 76-1234 and a total of one hour is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 242925 40

Supreme Court, U. S.
FILED
APR 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1234

PATRICIA R. HARRIS, Secretary of Housing and Urban Development, *et al.*,

*Petitioners.*

*v.*

BARBARA ROSS, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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No. 76-1234

---

PATRICIA R. HARRIS, Secretary of Housing and Urban Development, *et al.*,

*Petitioners.*

*v.*

BARBARA ROSS, *et al.*,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## RESPONDENTS' BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Respondents (Tenants) are tenants of the Uplands Apartments, Baltimore, Maryland, a 989 unit housing project that receives interest-reduction assistance pursuant to Section 236 of the National Housing Act. They commenced this suit against the Petitioner, Secretary of Housing and Urban Development, (The

Secretary) and others[1] in the United States District Court for the District of Maryland, requesting prospective implementation of an operating subsidy program for the project[2] so that they would not be required to pay the 18% rental increase which had been previously approved by the Secretary. The 18% rental increase meant that Tenants would have to pay more than 30% of their adjusted gross income in rent. Relative to the size of the apartment unit, the rent would be increased by $14 to $23 per month for each tenant family. Tenants were unable to pay this increase and knew that unless Uplands received an operating subsidy, they would be summarily evicted in favor of higher income tenants who could pay.

The statutory backdrop for the Tenants' suit was succinctly presented by the District Court below:

> "The 1974 Housing Act was designed to deal with problems which had occurred in the administration of federal housing programs since the 1968 Housing Act. Section 212, and in particular the subsections at issue here, subsections (f)(3) and (g), were intended to give the Secretary authority to adjust the subsidies for Section 236 project owners in order to meet increased operating costs. Under the 1968 Housing Act, the Secretary lacked authority to make such adjustments, with the result that increased operating costs were passed

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[1]The project owner, Community Services, Inc., other private persons, and other HUD officials were named as parties defendant (App. C., infra, p. 6a).

[2]The operating subsidy program, 12 U.S.C. (Supp. V) 1715z-1(f)(3), would provide for periodic payments on behalf of tenants who pay more than 30% of their adjusted gross income in rent to the owner of a qualifying housing project to offset increases in utility charges and local property taxes.

along from time to time in toto to tenants as increased rental charges.

The concern of the Congress about the effect of increased costs and resulting increased rents in Section 236 projects and its intent in enacting Section 212 of the 1974 Housing Act are expressed in the Senate Report which accompanies the Senate version of the Act, which was the one finally enacted.[3]

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[3]The Report in part is as follows:

"The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments.

While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance, and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A) the amount by which the sum of the cost of utilities, maintenance and local property taxes exceeds the initial operating expense level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community.

[footnote continued]

As the District Court below concluded:

> The very situation envisioned by Congress has occurred here. Increased operating costs at Uplands have resulted in increased rents, which the record shows are entirely justified. Yet the low income tenants affected are unable to pay all or a part of such increased rents and may now face eviction. It was precisely this problem which led Congress to pass the 1974 amendments and to direct the Secretary of HUD to set aside excess rentals collected to pay operating subsidies where the conditions of the statute were met.

"The Secretary's reading of the Statute", said the District Court below, "miscomprehends the discretion conferred on her by Congress in amending Section 236(f) and (g). . . . Undoubtedly, the Secretary under Section 236(f)(3) has the discretion to determine whether a particular increase in the cost of utilities or real estate taxes is reasonable and comparable to cost increases affecting other rental projects in the com-

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Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate if the "excess" funds derived from project operation were made available for the making of the additional assistance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expenses ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that the Secretary would establish the "initial" ratios as of a date not later than 180 days after enactment of the bill.

S. Rep. No. 93-693, 93rd Cong., 2nd Sess. (1974), reported in 3 U.S. Code, Cong. & Admin. News, pp. 4273, 4343-04 (1974).

munity. But Congress hardly intended to give the Secretary blanket discretion to frustrate Congressional policy and in effect adopt a different policy which the Secretary might believe would result in more comprehensive and more equitable results."

On the record here the District Court below found that the Secretary abused the discretion conferred upon her under Section 236(f)(3) and (g) in declining to make the subsidy payments requested to Uplands on behalf of the tenants. Tenants were therefore granted a permanent injunction requiring the Secretary to make monthly subsidy payments of $9166.88,[4] commencing on May 1, 1975. The Secretary applied for and was denied a stay in the courts below, but did not apply for a stay in this Court. Thus as a result of the monthly operating subsidy being paid by the Secretary, Tenants for the past two years have been paying no more than 30% of their adjusted gross income in rent.

## ARGUMENT

### I.

### THIS CASE DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW.

The Secretary in her Petition For Certiorari contends that this case involves an important question of national housing policy because she has limited amount of contract authority and, if she is required to use that contract authority to make operating subsidy payments, she must divert it from other housing programs, which would then suffer from underfunding. The Secretary's

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[4]The $9166.88 figure was derived by HUD from analysis of the increased utility costs and real estate taxes above the initial operating expense level, as applied to the 424 member tenant class.

argument that this case presents an important question of federal law is therefore premised entirely on her contention that she must use contract authority to spend the reserve fund for operating subsidies. That contention was rejected by the courts below.[5] Each of the courts to which the Secretary has addressed this argument has disagreed with her. All of the courts have said that the reserve fund, which consists entirely of excess rentals contributed by Section 236 project owners, is not subject to contract authority limitations. The text of the statute, as amended in 1974,[6] makes no reference whatsoever to contract authority; rather it provides that the reserve fund is "to be used" by the Secretary "to make" operating subsidy payments. The legislative history is consistent with the position taken by the courts.[7] Thus, the Secretary's argument that this

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[5]To the same effect, see *Dubose v. Hills*, 405 F. Supp. 1277 (D. Conn. 1975); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976); *Battles Farm Co. v. Hills*, 414 F. Supp. 521 (D.D.C. 1976); *Abrams v. Hills*, 415 F. Supp. 550 (C.D. Calif. 1976); *Parker Square Tenants Association v. The Department of Housing and Urban Development*, ____ F. Supp. ____, C.V. No. 75CV577-W-3 (W.D. Mo. 1976).

[6]12 U.S.C. §1715z-1(g). (Petitioner's Appendix E, 40a).

[7]See S.Rep. No. 93-693, 93rd Cong., 2d Sess. (1974); H.Conf. Rep. No. 93-1279, 93rd Cong., 2d Sess. (1974). Both are reported in 3 U.S. Code Cong. & Admin. News 4273, 4302-04, 4375 (1974). See also S.Rep. No. 94-326, 94th Cong. 1st Sess. (1975). See particularly S.Rep. No. 94-749, 94th Cong. 2d Sess. (1976):

> The Committee was informed that there is approximately $125 million in unused authority available to provide interest subsidies and operating assistance *and, in addition,* approximately $44 million in reserve as a result of the collection of excess rental charges. The reserve is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act. (Emphasis added.) S. Rep. No. 94-749, at p. 10.

case involved an important issue of housing policy because it requires her to choose among competing housing programs is simply false.

Further, the Secretary's argument that this case presents an important question of federal law because it involves the expenditure of over $50 million annually is misleading. While payment of operating subsidies nationwide might be that expensive, payment of operating subsidies to the single Section 236 project involved in this case costs less than $9,200.00 a month. For the Secretary to represent to the Court that this case involves an important question of national housing policy and to import into this case an alleged insufficiency of funds and resources to implement the operating subsidy program on a nationwide basis for some time in the future is to inject a host of speculative considerations which fall outside the record in this case. (See Petitioner's Appendix D, 36a-37a).

Because the Secretary can pay operating subsidies from the reserve fund without using contract authority, payment of operating subsidies will not interfere with other housing programs and resolution of this case therefore involves no major issue of national housing policy. And, since this case involves payment of subsidies to a single Section 236 housing project, the sums of money involved are not great enough to warrant attention by this Court.

## II.

### THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL.

Only one other Court of Appeals besides the court below has rendered a decision in a case involving implementation of the operating subsidy program and that court affirmed a District Court order requiring

payment of such subsidies. *Abrams v. Hills,* 547 F.2d 1062 (9th Cir. 1976). Thus, appellate decisions are unanimous.

Appeals from District Court orders requiring payment of operating subsidies are pending in two Circuits. *Underwood v. Hills,* C.A.D.A. Nos. 76-1603 and 76-1650, and *Dubose v. Hills,* C.A. 2 No. 76-1607. *Underwood* is a nationwide class action on behalf of all Section 236 tenants. It was argued in the Court of Appeals for the District of Columbia on February 22, 1977. The record in Underwood and the Secretary's argument on that record deal with the cost of implementing the operating subsidy on a nationwide basis; that argument is not apposite here. Until that case is decided, the Secretary cannot know what, if any, duty she has with respect to the $54 million balance in the reserve fund. It would thus be injudicious for the Court to grant the Secretary's petition in this case when the nationwide class action, containing in all probability a more extensive record and a more sophisticated development of the issues, has yet to be decided by the Court of Appeals for the District of Columbia.

## III.

## THE SECRETARY'S ARGUMENTS ARE WITHOUT MERIT.

The Secretary has repeatedly argued that the provisions of Section 236 grant her discretion to refuse to implement the operating subsidy program. The courts below and all the other courts before whom she has made this argument have held that the operating subsidy program is mandatory and have noted that even if the program were discretionary, the Secretary has

abused her discretion by refusing to pay any operating subsidies.[8]

The Secretary's other major argument is that she has limited contract authority and payment of operating subsidies would deplete her contract authority thereby interfering with other housing programs under Section 236. As already discussed above, the Courts have unanimously held that the Secretary does not have to use her contract authority to spend the reserve fund for operating subsidies.

In addition, the Secretary argues that passage of a recent statute – P.L. 94-378, 90 Stat. 1095 – (August 9, 1976) supports her view that contract authority is required to spend the reserve fund. That argument, too, has been rejected by the Court of Appeals below and by every court before which the Secretary has raised it. The Ninth Circuit Court of Appeals in *Abrams v. Hills, supra,* made a careful analysis of this point and rejected it, relying on a decision by the District Court in *Dubose v. Hills,* which also expressly rejected the Secretary's position.[9]

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[8] *Dubose v. Hills, supra; Harrison v. Hills,* ____ F. Supp. ____ CV No. 75-938 (W.D. Pa. 1975); *Campbell v. United States Department of Housing and Urban Development,* ____ F. Supp. ____ CV No. 75-471 (N.D. Ohio 1975); *Abrams v. Hills, supra; Parker Square Tenants Association v. The Department of Housing and Urban Development, supra; Carberry v. Hills,* ____ F. Supp. ____, CV No. 76-521-F (D. Mass. 1976); *Gertsch v. Hills,* 414 F. Supp. 15 (D. Utah 1976); *Sicuro v. Hills,* 415 F. Supp. 553 (C.D. Cal. 1976); *Battles Farm v. Hills, supra; Underwood v. Hills, supra.*

[9] The Court in *Abrams* stated:

> The Secretary argues that the above language [in P.L. 94-378] makes it clear that contract authority is required before any of the money in the reserve fund may be utilized. We can answer this argument no better than did

[footnote continued]

Therefore, because so many judges have considered the arguments here raised by the Secretary and have consistently rejected them it is reasonable to conclude that these arguments are without merit.

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the court in *Dubose v. Hills*, 420 F. Supp. 399 (D. Conn. 1976):

> The premises of this argument is that the reserve fund can be spent only pursuant to contract. In my earlier consideration of this issue, I reviewed the statutory language and the legislative history and concluded that "direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority." However, the defendants now argue that the proviso of Public Law 94-378, which states that the reserve fund shall be available "for payments on contracts entered into pursuant to the authorities enumerated above," supports their position that the reserve fund can only be spent pursuant to contract authority.
>
> The defendants place too much weight upon the proviso's reference to contracts. The language merely recognizes that many of the programs enumerated in Public Law 94-378, including interest reduction payments under the Section 236 program, do require the obligation of contract authority prior to the expenditure of appropriations. However, I conclude that the proviso does not indicate that the reserve fund can only be spent pursuant to contract. (420 F. Supp. at 401-02).

Our holding on this issue is thoroughly fortified by the Conference Report explaining the Committee's action in restoring the proviso (after it had been struck by the Senate):

> Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under Section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.

[footnote continued]

For the foregoing reasons, it is respectfully submitted that the Secretary's Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

LAWRENCE B. COSHNEAR

April 27, 1977

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The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area.

H.R. Report No. 94-1362, 94th Cong., 2d Sess. (1976). It therefore quite clearly appears that Congress did not intend that P.L. 94-378 should forestall such relief as was here ordered by the District Court. *Abrams v. Hills, supra,* at 1071-1072.

Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

NOS. 76-1234 AND 76-1261

# In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

BARBARA ROSS, ET AL.

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

HILDA ABRAMS, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS*

## BRIEF FOR THE PETITIONERS

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BARBARA ALLEN BABCOCK,
*Assistant Attorney General,*
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# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 76–1234

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

BARBARA ROSS, ET AL.

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No. 76–1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

HILDA ABRAMS, ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS*

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## BRIEF FOR THE PETITIONERS

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### OPINIONS BELOW

The opinion of the court of appeals in No. 76–1234 (*Ross* Pet. App. 1a-3a) [1] is not reported; the opinion of the district court upon entering a preliminary injunction in that case is reported at 396 F. Supp. 278 (*Ross* Pet. App. 6a–26a), and its opinion rendered in

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[1] "*Ross* Pet." refers to the petition in No. 76-1234; "*Abrams* Pet." refers to the petition in No. 76-1261.

connection with entry of a final judgment is reported at 405 F. Supp. 831 (*Ross* Pet. App. 27a–37a).

The opinion of the court of appeals in No. 76–1261 (*Abrams* Pet. App. 1a-22a) is reported at 547 F. 2d 1062. The opinion of the district court in that case (*Abrams* Pet. App. 24a-29a) is reported at 415 F. Supp. 550.

## JURISDICTION

The judgment of the court of appeals in No. 76–1234 (*Ross* Pet. App. 4a-5a) was entered on October 6, 1976. By orders dated December 29, 1976, and January 26, 1977, the Chief Justice extended the time within which to file a petition for a writ of certiorari to February 3, 1977, and March 5, 1977, respectively. The petition was filed on March 4, 1977.

The judgment of the court of appeals in No. 76–1261 (*Abrams* Pet. App. 23a) was entered on December 1, 1976. On February 22, 1977, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to March 31, 1977. The petition was filed on March 11, 1977.

The petitions were granted and the cases consolidated on May 23, 1977 (App. 178-179). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether 12 U.S.C. (Supp. V) 1715z–1(f)(3) requires the Secretary of Housing and Urban Development to establish and implement an operating subsidy program.

## STATUTES INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief (App., *infra*, pp. 26-31).

STATEMENT

Section 236 of the National Housing Act, as added, 82 Stat. 498, and amended, 12 U.S.C. (and Supp. V) 1715z–1, authorizes the establishment of three programs—the "interest reduction" (12 U.S.C. 1715z-1(a)), "deep subsidy" (12 U.S.C. (Supp. V) 1715z–1(f)(2)), and "operating subsidy" (12 U.S.C. (Supp. V) 1715z-1(f)(3)) programs. The issue in this case is whether the statute requires the Secretary of Housing and Urban Development to implement the operating subsidy program.

The respondents in these cases are the tenants of two housing projects that qualify for assistance under Section 236—the Uplands Apartments in Baltimore, Maryland (No. 76–1234), and the Meyler Park Apartments in San Pedro, California (No. 76–1261). In these suits against the Secretary, other federal defendants, and the private owners and managers of the respective housing projects, respondents contend that the Secretary is required to establish and implement an operating subsidy program for the projects.

In No. 76–1234, the district court on May 16, 1975, certified a class comprised of all tenants at Uplands Apartments who would be benefited by payment of the subsidy and granted a preliminary injunction requiring the Secretary to make subsidy payments to the project (*Ross* Pet. App. 11a, 25a-26a). On December 31, 1975, the district court granted a permanent injunction (*id.* at 37a). In its two opinions, the district court reasoned that the Secretary could have made operating subsidy payments without affecting her ability

to implement the other Section 236 programs and therefore was required by the statute to make such payments (*Ross* Pet. App. 19a–23a, 33a–37a). The court of appeals affirmed on the basis of the district court's opinion (*Ross* Pet. App. 1a-3a).

The district court in No. 76–1261 entered a similar injunction against the Secretary, but with the added requirement that payments to the Meyler Park project be made retroactively to February 18, 1975 (*Abrams* Pet. App. 24a–29a). The court ruled that the operating subsidy program was mandatory, relying in large part upon the conclusion reached in *Ross* that operating subsidy payments could be made from resources not available to other Section 236 programs (*id.* at 26a–29a). The court of appeals affirmed on this ground (*id.* at 1a–22a). While acknowledging that the Secretary possesses some discretion in the allocation of scarce resources among competing programs (*id.* at 12a-14a), the court held that it was an abuse of discretion to decline to implement the operating subsidy program, which, in the court's view, would not affect resources available for the other Section 236 programs.[2]

[2] The court concluded that although the statute "appears to give the Secretary broad discretion as to the timing of payments[,] * * * Congress intended for the Secretary to aid *some* projects by February 18, 1975" (*Abrams* Pet. App. 19a). Recognizing that ordinarily it would be appropriate to remand to permit the Secretary to determine whether the aid to Meyler Park should have started on that date, the court instead chose to affirm the district court's decision in order to avoid further delay, in light of the Secretary's consistent refusal to pay operating subsidies except pursuant to court order (*id.* at 20a).

## SUMMARY OF ARGUMENT

The courts below erred in requiring the Secretary to implement the operating subsidy program. The statute provides only that the Secretary "is authorized to make" operating subsidy payments. 12 U.S.C (Supp. V) 1715z-1(f)(3). Moreover, Congress has limited her ability to implement the Section 236 programs by failing to release sufficient contract authority to support all three programs.[3] Since the deep subsidy program is mandatory, the Secretary necessarily had to choose between honoring commitments previously made under the interest reduction program and implementing the operating subsidy program. The existence of a small "reserve fund", consisting of certain payments made by project owners since 1968, does not change this conclusion. That fund supplements the funds appropriated for use in paying amounts due under authorized contracts; it is not an alternative source of authority to enter into contracts.

The Secretary's exercise of her discretion in allocating available housing resources is subject to review by the President and Congress, but not by the courts. In any event, her conclusion that the national housing needs would be better served by using the available contract authority to satisfy commitments made under the

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[3] Programs under Section 236 are are funded by contract authority. Congress first specifies the total dollar amount of contracts that may be utilized by a given program. In subsequent appropriations acts, it releases specified amounts of that total contract authority, thus permitting the Secretary to enter into contracts up to the amount released. Finally, funds are appropriated as necessary to pay the amounts due under the authorized contracts.

interest subsidy program rather than by implementing the operating subsidy program was entirely reasonable.

## ARGUMENT

### THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT LAWFULLY DETERMINED NOT TO ESTABLISH AN OPERATING SUBSIDY PROGRAM

Section 236 of the National Housing Act, 12 U.S.C. (and Supp. V) 1715z–1, is designed to encourage private enterprise to develop rental and cooperative housing for lower income families.

Originally, Section 236 provided only for an "interest reduction" program. 82 Stat. 498. Under that program, the Secretary may pay a portion of the interest on mortgages covering qualified low income housing projects, so as to reduce the rent paid by the tenants. 12 U.S.C. 1715z-1(a).[4]

Section 212 of the Housing and Community Development Act of 1974, 88 Stat. 672, added to Section 236 authorization for establishment of the "deep subsidy" and "operating subsidy" programs. The deep subsidy program permits very low income tenants to occupy units in a Section 236 project by defraying their rental expense to the extent that it exceeds twenty-five percent of their income. 12 U.S.C. (Supp. V) 1715z-1(f)(2).

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[4] The tenant in a project covered by the interest reduction program pays a "basic rent"—*i.e.*, a reasonable rent assuming a mortgage bearing a one percent interest charge—or twenty-five percent of income, whichever is greater, but not more than fair rental value. 12 U.S.C. (Supp. V) 1715z-1(f)(1).

The operating subsidy program would provide payments to project owners to offset increases in utility charges and local property taxes, so as to obviate the necessity of raising the tenants' rent to cover these increased operating costs. 12 U.S.C. (Supp. V) 1715z–1(f)(3).[5] The subsidy would be available only on behalf of those tenants who pay more than twenty-five percent of their income for rent. *Ibid.*

The Secretary has not voluntarily implemented the operating subsidy program, for she has concluded that the limited resources available to her would more effectively further national housing objectives if expended for other programs she is authorized to establish and implement. The issue in this case is whether the Secretary's decision not to implement the operating subsidy program was consistent with Section 236.

A. THE SECRETARY HAS DISCRETION NOT TO IMPLEMENT THE OPERATING SUBSIDY PROGRAM

*1. The statute on its face does not impose a duty to implement the programs*

The statutory language establishing the operating subsidy program is permissive, not mandatory; the

[5] To determine eligibility for this subsidy, the Secretary first would determine the project's "initial operating expense level" (12 U.S.C. (Supp. V) 1715z-1(f)(3)), which consists of the cost of utilities and local property taxes payable by the project owner at the time the property achieved full occupancy, taking into account anticipated and customary vacancy rates. To the extent that costs of taxes and utilities exceed this initial expense level, the Secretary is authorized to pay a compensatory subsidy. No operating subsidy payment can be made unless the increased utility charges and property taxes are reasonable and comparable to increases affecting other rental property in the community.

Secretary is "authorized to make, and contract to make" operating subsidy payments. 12 U.S.C. (Supp. V) 1715z–1(f)(3). In contrast, the deep subsidy program is framed in unmistakably compulsory terms, providing that the Secretary "shall make, and contract to make" deep subsidy payments. 12 U.S.C. (Supp. V) 1715z-1(f)(2).[6]

The difference between these statutory formulations was recognized in *Commonwealth of Pennsylvania* v. *Lynn*, 501 F. 2d 848 (C.A.D.C.). There, the court sustained the authority of the Secretary to suspend the interest reduction program when she reasonably determined that its implementation interfered with other

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[6] We see no basis for the court of appeals' speculation in No. 76-1261 (*Abrams* Pet. App. 11a-12a) that the difference between the permissive language relating to the operating subsidy program and the mandatory language relating to the deep subsidy program is attributable merely to the fact that the deep subsidy program applies only to new projects, while the operating subsidy program applies also to existing projects. If Congress had intended to require implementation of the operating subsidy program, it could have used precisely the same language—"shall make, and contract to make"—that it used with the deep subsidy program. Nor does the Senate Report on which that court relied (*id.* at 12a) support its conclusion that the Secretary's discretion is limited to deciding whether particular subsidies should be paid. Indeed, that Report emphasizes the distinction in statutory language upon which we rely. The Report refers to the deep subsidy program as a "provision [that] would require the Secretary to make additional payments," and as a "requirement" that could be modified only in certain circumstances; in contrast, the Report notes that the bill also provides that "the Secretary would be authorized" to make operating subsidy payments, but that such payments "could only be made" in certain circumstances. S. Rep. No. 93-693, 93d Cong., 2d Sess. 32 (1974).

housing goals. The court, noting that the statute establishing the interest reduction program was framed in nonmandatory terms, held that the decision whether to implement the program had been committed by Congress to the discretion of the Secretary. 501 F. 2d at 854.

As is also true with respect to the operating subsidy program at issue here, the statute merely authorizes the Secretary to institute an interest reduction program. 12 U.S.C. 1715z-1(a). Indeed, the statutory language relating to the interest reduction program is identical to that here—"the Secretary is authorized to make, and to contract to make * * *" (*ibid.*). Neither statutory provision contains any imperative phrase that would render either subsidy compulsory.[7]

In short, the statute does not impose a duty on the Secretary to implement the operating subsidy program; it merely empowers her to do so if she determines that such implementation would further the national housing objectives established by Congress.[8]

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[7] The provisions that an initial operating expense level for each project "shall be established" (12 U.S.C. (Supp. V) 1715z-1(f)(3)) and that "the initial operating expense level for [existing projects] shall be established by the Secretary not later than [February 18, 1975]" (12 U.S.C. (Supp. V) 1715z-1(g)) do not make the program mandatory. Instead, read in context, they mean only that the Secretary was required to decide promptly whether to implement the program, at least for existing projects. If she had decided to implement the program, she would have had to follow the established statutory procedure for doing so. The calculation of the initial operating expense level is simply part of that required procedure.

[8] The Secretary's overriding responsibility, set forth in Section 2 of the Housing Act of 1949, 63 Stat. 413, is to achieve

*2. Congress' failure to provide sufficient contracting authority is inconsistent with a duty to implement the program*

a. The funding of programs under Section 236 is by contract authority. See *Train* v. *City of New York*, 420 U.S. 35, 39 n. 2. Pursuant to that procedure, Congress first specifies the total dollar amount of contract payments that may be made under Section 236, *i.e.*, the "authorized contract authority." By subsequent appropriation statutes, Congress "releases contract authority," *i.e.*, permits the Secretary to use specified amounts of that authorized contract authority for a given fiscal year or other prescribed period of time. From time to time thereafter, Congress appropriates "liquidation funds," *i.e.*, the funds necessary to satisfy contractual obligations entered into pursuant to the released contract authority. Congress last released contract authority for Section 236 in 1972 (86 Stat. 540).

The released contract authority at the beginning of fiscal year 1976 was approximately $125 million—an amount insufficient to fund all three Section 236 programs even for that one year. It was estimated that for that fiscal year, including the transitional quarter (July-September, 1976), the Secretary's commitments under the interest reduction program would require $74.8 million, the mandatory deep subsidy program

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"the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." 42 U.S.C. 1441. It is essential to the effectuation of this statutory purpose that the Secretary be empowered "to choose between alternative methods of achieving the national housing objectives." *Commonwealth of Pennsylvania* v. *Lynn*, *supra*, 501 F. 2d at 855.

would require $50 million, and the operating subsidy program, if implemented, would require $53.7 million.[9] Thus, after sufficient contract authority to fund the mandatory deep subsidy program was set aside, there was insufficient contract authority remaining both to honor existing commitments under the interest reduction program and to implement the operating subsidy program.[10]

Since Congress has not released sufficient contract authority for implementation of all three Section 236 programs, it cannot be understood to have required the Secretary to establish and implement each one. In particular, since Congress was aware of the Secretary's obligations under the interest reduction program [11] and presumably did not intend those obligations to be shirked, it cannot be understood to have required the Secretary to implement the operating subsidy program

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[9] Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, p. 5, Apps. F and G.

[10] The Secretary decided to honor the existing commitments on interest reduction contracts, which had been made with developers of low income housing prior to the suspension of the interest reduction program in January 1973 and upon which those developers had relied. See pp. 20-24 and note 15, *infra*. See also *Commonwealth of Pennsylvania* v. *Lynn*, *supra*, 501 F. 2d at 850.

[11] Hearings on HUD-Space-Science-Veterans Appropriations for 1975 before a Subcommittee of the House Committee on Appropriations, 93d Cong., 2d Sess., Part 6, p. 601 (1974) (statement of Mr. Tiernan). Hearings on H.R. 14233 (Department of Housing and Urban Development, and Certain Independent Agencies Appropriations for Fiscal Year 1977) before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 2d Sess., Part 4, pp. 1176, 1177 (1976) (statement of Secretary Hills).

instead of satisfying those obligations. Moreover, the Secretary expressly advised Congress of her intention not to implement the operating subsidy program when she appeared before the Senate Committee on Appropriations on April 21 and 22, 1975 (App. 47).

It has been five years since Congress released additional contract authority for programs under Section 236.[12] Since that time, the existing released contract authority has been insufficient to fund all three Section 236 programs. The amount of released contract authority has steadily diminished over these years until, under current HUD budget estimates, all contract authority available for current Section 236 programs will be exhausted by the end of this fiscal year.[13]

This history suggests that Congress, through the power of the purse, has exercised its supervening authority to allocate scarce housing resources elsewhere, and to deny the Secretary the ability fully to exercise her own delegated authority to implement all three Section 236 programs. This choice by Congress is incon-

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[12] Congress regularly has been apprised of the steady decline of available released contract authority through the annual budgets submitted to Congress by the President. See, *e.g.*, Budget of United States Government for Fiscal 1976 (January 1975); Budget of United States Government for Fiscal 1977 (January 1976).

[13] The Secretary informs us that the released contract authority available for Section 236 programs at the beginning of the current fiscal year was approximately $35.5 million, of which $17.5 million was required for the interest reduction program, $17.5 million for the deep subsidy program, and $.5 million for payments under the operating subsidy program pursuant to court orders. We are further informed that full implementation of the operating subsidy program for the fiscal year would have cost approximately $43 million.

sistent with respondents' claim that the Secretary lacks discretion and must implement the operating subsidy program. The history of congressional appropriations simply does not comport with a statutory scheme of mandatory character."

b. The courts below disagreed with this conclusion, in large part because they purported to identify an alternative source of funding for the operating subsidy program. They took the view that, unlike the other Section 236 programs, the operating subsidy program does not require contract authority for its implementation but instead may be funded directly out of the "reserve fund," a special fund consisting of payments from project owners to the Secretary of amounts collected in excess of "basic rental charges" (note 4, *supra*; 12 U.S.C. (Supp. V) 1715z-1(g)). See *Ross* Pet. App. 2a, 35a-36a; *Abrams* Pet. App. 14a-15a, 28a.

The reserve fund was created when the Congress first authorized the Secretary to establish the interest reduction program in 1968; it was then to be used only for interest reduction payments. 12 U.S.C. 1715z-1(g). The 1974 amendment to Section 236 requiring establishment of the deep subsidy program and authorizing establishment of the operating subsidy program provided that the reserve fund was to be available only to

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[14] Congress now is considering amendments to the statute authorizing establishment of the operating subsidy program, in connection with the Housing and Community Development Act of 1977 (H.R. 6655). Each house has approved a different amendment that would make the modified program mandatory. Both amendments are now pending before a Conference Committee for resolution. See H.R. 6655, 95th Cong., 1st Sess. (1977); H.R. Rep. No. 95-236, 95th Cong., 1st Sess. 21, 110 (1977).

make operating subsidy payments. We are informed by the Secretary that as of December 31, 1976, the reserve fund contained approximately $54.4 million.[15]

The reserve fund cannot, however, be employed independently of contract authority; rather, the fund constitutes monies in the nature of liquidation funds to be used to fulfill contracts. The lack of available contract authority therefore cannot be cured by making payments for operating subsidies out of the reserve fund.

Since its enactment, Section 236, like many other federal housing programs, consistently has been administered through the use of contract authority.[16] Noth-

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[15] Approximately $18 million of that sum represents overpayments by project owners. The district court in *Underwood* v. *Hills*, 414 F. Supp. 526 (D. D.C.), held that the Secretary could refund these overpayments to the project owners; the plaintiffs in *Underwood* are challenging that holding on appeal (C.A.D.C., Nos. 76-1603 and 76-1650).

The only payments made out of the fund since 1968 have been to satisfy operating subsidy contractual obligations entered into pursuant to court orders. In those cases, the reserve fund has been used as a source of liquidation funds supplementing appropriated funds. The payments made totaled approximately $650,000 as of May 31, 1977. The fund is currently growing at the rate of about $12 million a year. See Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, App. F.

[16] More than $3 billion in contract authority is obligated annually for various housing programs, including (1) payments to public housing agencies for the purchase of low income housing projects and payments to finance construction of low income housing (42 U.S.C. (Supp. V) 1437c); (2) payments to educational institutions (12 U.S.C. 1749 *et seq.*); (3) rent supplement payments, which assist low-income persons in meeting their rent (12 U.S.C. 1701s); and (4) the interest reduction and deep subsidy programs under Section 236.

ing suggests that Congress intended, by establishing the reserve fund, to create an exception to this established practice.

The court in No. 76-1261 concluded (*Abrams* Pet. App. 14a n. 11) that the statutory authority to "make and contract to make" operating subsidy payments (12 U.S.C. (Supp. V) 1715z-1(f)(3)) implied that Congress "contemplated payments not under contract." But the essence of the operating subsidy program is the Secretary's agreement to make payments to the project owners on behalf of qualified tenants; it is this agreement, which is contractual in nature, that makes it unnecessary for the project owner to raise those tenants' rents. The program thus necessarily contemplates that the Secretary will commit herself by contracting to make future payments.

Moreover, the reserve fund could not have been regarded by Congress as a separate means of conferring contract authority for implementation of the operating subsidy program, for the amount that will be available in the fund cannot be ascertained in advance. The very essence of contract authority is predictability: a large fixed amount of authority is granted in advance, so that the Secretary can measure her resources against the varied tasks and opportunities that she faces and plan her programs around those resources.

In contrast, the sufficiency of the reserve fund is essentially unpredictable: it cannot be known whether any excess rents at all will be collected in any given year, much less what the amount of such rents will be. A program that depended upon such indeterminate and fluctuating authority would be established upon a pre-

carious basis indeed. In the absence of any clear indication that it intended to do so, Congress cannot be assumed to have devised a new statutory mechanism, a "quasi-contract authority," that would have launched the program on such an uncertain course.

The reserve fund is a fund of money, not a fund of authority. Congress must have intended the reserve fund, in keeping with its character, to be a supplemental source of appropriated monies, not a supplemental source of contract authority.[17]

It follows that the monies in the fund are to be used in making payments under contracts previously en-

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[17] It would not strengthen respondents' argument even if the reserve fund had been intended to act as a grant of additional contract authority. The monies in the reserve fund have never been sufficient to sustain a continuing operating subsidy program. Even after accumulating since 1968, the amount collected still is too small to permit implementation of the program for a significant time (see note 15, *supra*). Indeed, retroactive payments alone would entirely exhaust the fund. See the Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, pp. 10 n. 8, 12. This is further evidence that Congress could not have intended to require implementation of the operating subsidy program.

Respondents suggest (Br. in Opp. No. 76-1234, p. 7; Br. in Opp. No. 76-1261, pp. 4, 8-9) that since the reserve fund is sufficient to pay them the amounts to which they claim entitlement, the insufficiency of the reserve fund to support a national program is irrelevant. But respondents have suggested no reason why they should be preferred over other similarly situated tenants of other Section 236 projects, all of whom are represented in class suits currently before the courts (see *Ross* Pet. 6-7, nn. 7 and 9). Respondents should be entitled to payments only if the Secretary is required to establish a nationwide program. A comparison of the cost of establishing such a program with the funds available to do so is relevant to determining whether Congress intended such a requirement.

tered into by the Secretary. In other words, if the operating subsidy program were to be implemented, contract authority would have to be utilized to execute subsidy agreements, which the Secretary could liquidate by using appropriated funds together with whatever monies were contained in the reserve fund. The monies in the reserve fund therefore would reduce the amounts that the Congress would need to appropriate from the Treasury to meet outstanding contractual obligations.

Recent legislation confirms this view of the reserve fund's function. In a recent appropriation act, Pub. L. 94-378, 90 Stat. 1095, 1096, Congress eliminated the requirement that the fund be employed only for operating subsidies and made it available for a variety of other housing programs as well.[18] This statute makes plain that the reserve fund is a source of money, not of contract authority. It provides that the reserve fund, like appropriated sums, "shall be available * * * for the payments on contracts entered into pursuant to" authorized housing programs. Conversely, if the Secretary has not exercised her authority to enter into a contract, *i.e.*, has not utilized contract authority, she may not tap the reserve fund. Pub. L. 94-378 therefore demonstrates that Congress understands that the reserve fund is simply a substitute for appropriated funds and that

[18] Although all the monies now in the reserve fund have been earmarked by the Secretary for payments other than operating subsidies, the United States Court of Appeals for the District of Columbia Circuit, in *Underwood* v. *Hills*, *supra*, has enjoined the Secretary from making payments from the fund with respect to programs other than the operating subsidy program pending the outcome of that case.

neither may be utilized for the operating subsidy program or any other housing program in the absence of contract authority.[19]

In rejecting this analysis, the courts below relied upon the original statutory language establishing the fund, which had reserved the monies in the fund exclusively for use in the operating subsidy program. Thus, in No. 76-1261, the court concluded that the statement that the fund is "to be used" to make operating subsidy payments must be construed to mean that the reserve fund is not subject to contract authority limitations (*Abrams* Pet. App. 15a). But this language, which Pub. L. 94-378 in any event supersedes, did not dispense with contract authority; it simply limited the purpose for which the fund could be used and prevented its return to the Treasury or its commingling with appropriated funds for use in other housing programs.

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[19] The court in No. 76-1261 (*Abrams* Pet. App. 22a) noted that the Conference Report on Pub. L. 94-378 (H.R. Conf. Rep. No. 94-1362, 94th Cong. 2d Sess. 5 (1976)) stated:

> The committee of conference is agreed that this action [making the reserve fund available for other housing programs] shall not prejudice any suit now or hereafter before the courts in this area.

This means no more than that the availability of the reserve fund for other Section 236 programs after October 1, 1976, does not affect the right of litigants such as respondents to be paid from the reserve fund if they prevail on the merits. That appears to be the basis for the court of appeals' orders in *Underwood* v. *Hills*, *supra* (see note 18, *supra*). But the congressional action in folding the reserve fund into the general housing payments account is nevertheless strong evidence of its understanding of the nature of the fund, both before and after October 1, 1976.

The dedication of the reserve fund for use in the operating subsidy program did not override the permissive, discretionary nature of the Secretary's authority to implement that program (see pp. 7-13, *supra*). Rather, the fund was "to be used" in the operating subsidy program once that program was implemented, *i.e.*, once the Secretary in her discretion chose to use her limited contract authority to incur obligations under that program. In short, the provision that the fund was "to be used" did not authorize the Secretary to make operating subsidy commitments in excess of her authorized contract authority any more than the similar provision in Pub. L. 94-378 that the reserve fund "shall be available" for other Section 236 programs indicates that contract authority need not be used in implementing those programs.

Accordingly, the courts below erred in holding that the exercise of contract authority was not a prerequisite to the expenditure of the reserve fund, and thus that the Secretary could have implemented the operating subsidy program without affecting the resources available for the other Section 236 programs.

### B. THE SECRETARY'S EXERCISE OF HER DISCRETION MAY NOT BE JUDICIALLY OVERRIDDEN

The Secretary's discretionary determination not to implement the operating subsidy program involved the evaluation of national housing needs, and the prediction of the relative effectiveness of the alternatives available for meeting those needs. Moreover, that determination has a substantial impact on the Secretary's ability to implement other programs she is authorized to establish. The decision whether or not to exercise discretion to implement a major federal housing program thus is

not only peculiarly a matter within the Secretary's special competence, it lies at the very core of her responsibilities.

The ultimate control over housing policy is with the President and the Congress. If they disagree with the Secretary's estimate of national housing needs, they have remedies available. The President can replace her if he concludes she is not effectively furthering his housing policy. If Congress disagrees with her decisions, it can require her to act by making implementation mandatory. The courts have no similar responsibility for developing and implementing national housing policy. They therefore have no power to control or override the exercise of the Secretary's discretion on these fundamental policy issues; the determination whether one available housing program better serves national needs than another is simply not a judicial function. See *Marbury* v. *Madison*, 1 Cranch 137, 165-166; *United States ex rel. Redfield* v. *Windom*, 137 U.S. 636, 643-644; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 146; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224.

In any event, the Secretary's decision not to allocate resources to the operating subsidy program was reasonable and proper. Confronted with steadily dwindling contract authority, and lacking a clear statement from Congress as to its preference between the interest reduction and operating subsidy programs,[20] the

[20] Congress was advised of the Secretary's decision not to proceed with the operating subsidy program (see p. 12, *supra*). Although individual members of Congress expressed disapproval of this decision (*e.g.*, Hearings on H.R. 8070 (Department of Housing and Urban Development, and Certain Inde-

Secretary determined to utilize her remaining contract authority to honor commitments previously made under the interest reduction program rather than to dishonor those commitments in order to implement the operating subsidy program.

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pendent Agencies Appropriations for Fiscal Year 1976) before a Subcommittee of the Senate Committee on Appropriations, 94th Cong., 1st Sess., Part 1, p. 665 (1975) (statement of Sen. Brooke)), these remarks evidently did not reflect a congressional concensus. Indeed, to the extent that such a concensus is discernible, Congress apparently favored greater emphasis upon the interest reduction component of Section 236 in preference to the operating subsidy program. In a 1974 appropriation act, Congress prohibited the Secretary from using appropriated funds for operating subsidies and limited the use of such funds to interest reduction payments instead. Pub. L. 93-414, 88 Stat. 1096. The accompanying Conference Committee Report expressly directed that contract authority not be used for operating subsidies in future projects. H.R. Conf. Rep. No. 93-1310, 93d Cong., 2d Sess. 6 (1974). The Senate Report on a supplemental appropriation act that year directed the Secretary to "take into account" the operating subsidy program. S. Rep. No. 93-1255, 93d Cong., 2d Sess. 8 (1974). Later appropriation acts, and accompanying legislative commentary, do not even refer to the operating subsidy program, but instead continue to express concern about the lack of sufficient low-income housing, a problem addressed by the interest reduction program, not by operating subsidies (see pp. 22-23, *infra*). See H.R. Rep. 94-313, 94th Cong., 1st Sess. 4 (1975); S. Rep. No. 94-326, 94th Cong., 1st Sess. 9 (1975). Finally, Congress ratified the Secretary's decision when it transferred monies in the reserve fund, formerly reserved for operating subsidies, to a general fund available for a variety of housing programs (see pp. 17-18, *supra*). This decision by Congress is indicative of Congress' disenchantment with the operating subsidy program as then authorized.

New legislation involving the program is currently under consideration (see note 14, *supra*). Those proposals, if enacted, would significantly modify the program as it now stands, and thus cannot be understood to reflect congressional re-enactment of the program the Secretary chose not to implement.

Before the interest reduction program was suspended in January 1973, the Secretary had represented to state and local public authorities and private developers that she would assist certain planned housing projects under that program; those entities had relied upon her representation in proceeding with the planning and construction of such projects (App. 33-35). See *Commonwealth of Pennsylvania* v. *Lynn*, *supra*, 501 F. 2d at 850. The Secretary's failure to use her limited contract authority to carry out these existing commitments to state and local authorities and private developers "would [have] create[d] chaotic conditions" and defeated their substantial, and justified, reliance (App. 34).

In addition, the decision to honor existing interest reduction commitments would better serve the consistently expressed desire of Congress that Section 236 contract authority be utilized to increase housing production for low income families.[21] The interest reduction program, by reducing the effective cost of project mortgages, encourages the production of new housing for low income families, whereas the operating subsidy program, which does no more than absorb a portion of the increased utility charges and local property taxes that otherwise would be passed on to tenants in the

[21] H.R. Rep. No. 93-1139, 93d Cong., 2d Sess. 4 (1974); S. Rep. No. 93-1056, 93d Cong., 2d Sess. 6-8 (1974). See note 20, p. 21, *supra*.

form of higher rentals, does nothing to stimulate building.[22]

Moreover, the Secretary believed that the operating subsidy program would be excessively costly to administer, since it would require constant recalculations not only of the actual and reasonable increases in utility costs and local taxes for each project but also of the subsidy levels for each tenant; this administrative burden would be shared by the project owners.[23] It could

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[22] The Secretary further determined that alternative programs would more effectively achieve the aims of the operating subsidy program (App. 47). For example, the "Section 8 set-aside program" (42 U.S.C. (Supp. V) 1437f; 24 C.F.R. Part 886) provides rent assistance that eliminates the need for operating subsidies. The families in projects receiving the benefit of Section 8 assistance pay no more than twenty-five percent of their adjusted income toward rent. Operating subsidies are payable only on behalf of tenants paying more than twenty-five percent of their income for rent. The Secretary advises us that Section 8 assistance currently is being provided to 111,448 housing units and that existing contracts for such assistance require obligation of $158 million in contract authority annually. That is independent of the contract authority available for Section 236 programs.

[23] There are approximately 4,000 projects receiving Section 236 assistance. To implement the program, the Secretary would have to calculate the initial operating expense level for each project; she would then establish the maximum monthly operating subsidy for each project. See note 7, *supra*. On the basis of that information, the project owners would calculate the actual operating subsidy applicable to each of the approximately 400,000 units involved, and determine each tenant's eligibility on the basis of a monthly review of all income data of that tenant. Each project owner would then submit billings to the Secretary reflecting the total subsidy payable to the project for that month. The Secretary would review these billings and return erroneous ones for recomputation. See the Stay Application in *Hills* v. *Underwood*, No. A-259, O.T. 1976, App. G.

be anticipated, moreover, that any increase in a project owner's administrative costs would eventually be passed on to all his tenants, not just those receiving the subsidy, in the form of higher rents. See 12 U.S.C. (Supp. V) 1715z-1(f)(1) and 12 U.S.C. 1715z-1(e). Those increases could substantially offset any benefit tenants might otherwise experience from payment of the subsidy. These considerations additionally justify the Secretary's decision not to implement the operating subsidy program.[24]

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This process would involve not only very substantial monthly operating costs, but also extremely large start up costs, in view of the need to train the staffs both of HUD and of the project owner and to make the initial calculations. If the Secretary must make retroactive payments, the difficulty of locating previous residents of affected projects and determining their eligibility on the basis of their monthly income since February 1975 will also add greatly to the cost of administering the program. Finally, if the Secretary must implement this program at approximately the same time she is also implementing the modified program required by the proposed amendments (see note 14, *supra*), the potential for confusion and the waste of housing funds are obvious.

[24] The court in No. 76-1234 (*Ross* Pet. App. 36a) suggested that the lack of sufficient funds fully to implement the operating subsidy program simply required the Secretary to implement a reduced program. In view of the very large administrative costs necessary for even partial implementation of the operating subsidy program, this would be a signally inefficient use of the limited funds available for housing programs. Moreover, there is no indication that Congress intended the Secretary to choose among otherwise similarly situated tenants faced with rent increases because of reasonable increases in taxes and utility rates, nor does the court of appeals suggest a neutral principle (other than a race to the courthouse) by which such a choice could be made.

## CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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AUGUST 1977.

## APPENDIX

12 U.S.C. 1715z-1 provides in pertinent part:

(a) *Authorization for periodic interest reduction payments on behalf of owner of rental housing projects.*

For the purpose of reducing rentals for lower income families, the Secretary is authorized to make, and to contract to make, periodic interest reduction payments on behalf of the owner of a rental housing project designed for occupancy by lower income families, which shall be accomplished through payments to mortgagees holding mortgages meeting the special requirements specified in this section.

(b) *Restrictions on payments; payments with respect to projects financed under State or local programs; mortgage insurance premium.*

Interest reduction payments with respect to a project shall only be made during such time as the project is operated as a rental housing project and is subject to a mortgage which meets the requirements of, and is insured under, subsection (j) of this section: *Provided,* That the Secretary is authorized to continue making such interest reduction payments where the mortgage has been assigned to the Secretary: *Provided, further,* That interest reduction payments may be made with respect to a mortgage or part thereof on a rental or cooperative housing project owned by a private nonprofit corporation or other private nonprofit entity, a limited dividend corpo-

ration or other limited dividend entity, or a cooperative housing corporation, which is financed under a State or local program providing assistance through loans, loan insurance, or tax abatements, and which may involve either new or existing construction and which is approved for receiving the benefits of this section. The term "mortgage insurance premium", when used in this section in relation to a project financed by a loan under a State or local program, means such fees and charges, approved by the Secretary, as are payable by the mortgagor to the State or local agency mortgagee to meet reserve requirements and administrative expenses of such agency.

(c) *Amounts of payments.*

The interest reduction payments to a mortgagee by the Secretary on behalf of a project owner shall be in an amount not exceeding the difference between the monthly payment for principal, interest, and mortgage insurance premium which the project owner as a mortgagor is obligated to pay under the mortgage and the monthly payment for principal and interest such project owner would be obligated to pay if the mortgage were to bear interest at the rate of 1 per centum per annum.

12 U.S.C. (Supp. V) 1715z-1(f)(3) provides:

For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at

the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

12 U.S.C. (Supp. V) 1715z-1(g) provides:

The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund

to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

42 U.S.C. 1441 provides in pertinent part:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance ol slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities

and to the advancement of the growth, wealth, and security of the Nation. * * *

Pub. L. 94-378, 90 Stat. 1095, 1096, provides in pertinent part:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

* * * * *

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z, 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), $2,975,000,000; *Provided,* That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as

amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above.

Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1977

**Nos. 76-1234 and 76-1261**

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

BARBARA ROSS, ET AL.

---

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

**On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits**

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1234

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

BARBARA ROSS, ET AL.

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PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

v.

HILDA ABRAMS, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

## Brief for the Respondents

### QUESTION PRESENTED

Whether 12 U.S.C. §§ 1715z-1(f)(3) *and* (g) (Supp. V 1975) require the Secretary of the Department of Housing and Urban Development (HUD) to establish and implement an operating subsidy program.

### STATUTES INVOLVED

Statutory provisions are set forth in the appendix to the Secretary's Brief. Pet. Br. App. pp. 26-31. Since the filing of the Secretary's Brief, Congress amended 12 U.S.C.

§§ 1715z-1(f)(3) and (g). Those amendments are set out in Respondents' Appendix.

## STATEMENT

Respondents in these consolidated cases are lower income tenants of two Section 236 federally subsidized and insured multifamily projects who were charged excessive rents because they were denied the benefits of the operating subsidy program. In the spring of 1975, the Petitioner, Secretary of HUD (Secretary) approved a rent increase of 18% for tenants residing in Upland Apartments, Baltimore, Maryland. *Ross* No. 76-1234. This rental increase, if not enjoined, would have required Respondents to pay over 30%, and in some instances in excess of 100%, of their adjusted family income for rent. Joint Appendix (J.A.) pp. 13-15. For Meyler Park Apartments, the Secretary between November 1974 and September 1975 approved two rent increases totalling 21.2%. The combined rental increases required Respondents to pay from 30-46% of their adjusted incomes for rent. *Abrams* No. 76-1261, J.A. pp. 92, 108-109. The rent increases in both of these projects were attributed, in part, to "dramatic" increases in utility costs and property taxes.[1] J.A. pp. 11, 123, 129. Respondents could not pay these increases and knew that unless an operating subsidy was provided to their projects, they would be faced with Hobson's choice of foregoing some of life's necessities (J.A. pp. 80-90); moving to cheaper but undoubtedly inadequate accommodations (J.A. pp. 1 no. 6, 110; *Ross* Appendix on Appeal, p. 42); or facing summary eviction.

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1. For Upland Apartments, the project owner estimated substantially increased costs for 1975, including $34,724 for real estate taxes and $120,000 for utilities. J.A. pp. 1 no. 6, 2 no. 14, *Ross* Appendix on Appeal, pp. 41, 81. The project owner for Meyler Park stated that in the fiscal year ending February 28, 1975, the project sustained a net loss of $41,831. J.A. p. 111.

Respondents would not have faced this choice, if the Secretary had administered the Section 236 program consistently with the will of Congress. The Section 236 program is one of a number of federal housing programs designed to help achieve the national housing goal "of . . . a decent home and suitable living environment for every American family." 12 U.S.C. § 1441 (1970). In particular, the Section 236 program was designed "for the purpose of reducing rentals for lower income families," 12 U.S.C. § 1715z-1(a) (Supp. V 1975) by providing for federal mortgage insurance and interest reduction payments to project owners so that rental rates to the tenants could be lowered accordingly.

As the program was originally designed, all tenants would pay at least the "basic rent" or 25% of adjusted income, whichever is greater. Basic rent is designed to be sufficient to operate the project and meet the payments on a 1% interest mortgage. No tenant would pay more than "fair market rent" computed on the basis of operating costs plus amortization of the mortgage at the commercial interest rates. 12 U.S.C. § 1715z-1(f)(1) (Supp. V 1975). The interest reduction subsidy payment equals the difference between the hypothetical 1% interest and the commercial interest actually charged.

Congress originally anticipated that providing an interest reduction subsidy would ensure that the rents would be reasonable for lower income tenants. However, rapidly rising utility costs and property taxes outstripped the capacity of the interest reduction subsidy program to hold rents at reasonable levels. Accordingly, Congress in 1974, amended the Section 236 program to help alleviate a number of "structural" problems in the program. One amendment created the "deep subsidy" program which permits

the very poorest families to occupy 20% of the units in projects constructed after August 22, 1974. 12 U.S.C. § 1715z-1(f)(2) (Supp. V 1975).

At issue here is another amendment establishing the "operating subsidy" program. This program requires the Secretary to make payments to project owners to offset reasonable increases in utility charges and local property taxes, so as to obviate the necessity of raising the tenants' rent to cover these increased costs. The subsidy is only available on behalf of those tenants who pay more than 30%[2] of their income for rent. 12 U.S.C. § 1715z-1(f)(3).

Congress required that the Secretary begin implementation of the operating subsidy program by February 18, 1975. It ordered the Secretary to establish an initial operating expense level for existing projects by that date and provided two sources of funding: (1) it directed that rents collected in excess of basic rent "shall be credited to a reserve fund to be used by the Secretary to make" operating subsidy payments; (2) it also authorized the use of contract authority to make operating subsidy payments.[3]

In October 1977, Congress amended the operating subsidy program to reaffirm that the program is mandatory and that operating subsidy payments must be made from the reserve fund. Pub. L. No. 95-128 (October 12, 1977) Appendix pp. 1-2.

Despite the repeated congressional use of mandatory language and the provision of funding, the Secretary has

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2. Tenants who pay their own utilities become eligible when their rent exceeds 25% of adjusted income.

3. 12 U.S.C. § 1715z-1(g) (Supp. V 1975). *See also, Abrams v. Hills*, 547 F.2d 1062, 1064-1067 (9th Cir. 1976); Secretary's Petition for a Writ of *Certiorari* Appendix in Abrams, No. 76-1261 (*Abrams Cert.* Pet. App.) pp. 3a-10a; *Ross v. Community Services, Inc.*, 396 F. Supp. 278, 281 (D.Md. 1975); Secretary's Petition for a Writ of *Certiorari* Appendix in *Ross*, No. 76-1234 (*Ross Cert.* Pet. App.) pp. 7a-8a.

for over 3 years refused to implement the operating subsidy program. Thus, Respondents filed suits seeking to enjoin the rental increases imposed by the owners of the projects and to order the Secretary to make operating subsidy payments.[4] Summary judgment was entered in favor of both the *Ross* and *Abrams* Respondents. In both cases the Courts rejected the Secretary's arguments that implementation of the operating subsidy program is discretionary and mandated the Secretary to make payments.[5] Payments in *Abrams* were ordered commencing on February 18, 1975[6], and in *Ross* payments were ordered as of May 1, 1975. The Fourth and Ninth Circuits affirmed the lower Courts' decisions in every aspect.[7]

## SUMMARY OF ARGUMENT

The judgments of the Courts below should be affirmed. The overall scheme of the Section 236 program, the language of the operating subsidy sub-sections, and concurrent and

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4. Both *Abrams* Respondents and the owners of Meyler Park Apartments made application for the operating subsidies. The Secretary failed to respond to either of these requests. J.A. pp. 95, 134.

5. *Ross v. Community Services, Inc.*, 396 F. Supp. at 286; 405 F. Supp. 831, 837 (D.Md. 1975), *Ross Cert.* Pet. App. pp. 20a, 31a; *Abrams v. Hills*, 415 F. Supp. 550, 552, 553 (C.D.Cal. 1975), *Abrams Cert.* Pet. App. pp. 27a, 29a.

6. The Secretary on July 1, 1976, while appealing the lower Court decision, made available to the *Abrams* Respondents Section 8 benefits which reduced their rents to 25% of their family income. 42 U.S.C. § 1437f (Supp. V 1975). Because tenants who pay no more than 25% of their income for rent are ineligible to receive the benefits of the operating subsidy program, the Secretary argued to the Ninth Circuit that the *Abrams* Respondents' claim was prospectively moot. The Ninth Circuit considered the Respondents' claim for payments from February 18, 1975 to July 1, 1976, an alive and important issue and hence affirmed the District Court's Order.

7. *See, Abrams v. Hills*, 547 F.2d at 1071, *Abrams Cert.* Pet. App. p. 20a; *Ross v. Community Services, Inc.*, was affirmed *per curiam*, 544 F.2d 514 (4th Cir. 1976), *Ross Cert.* Pet. App. p. 3a.

post-enactment legislative history all demonstrate that the operating subsidy program is mandatory. Congress intended that the reserve fund, which presently contains $54.4 million, be used to implement the program, and that while contract authority should be used to meet operating subsidy requirements that exceed reserve fund resources, utilization of contract authority is not necessary to spend the reserve fund.

If this Court should find that the operating subsidy program is not mandatory, then Respondents submit that the judgments of the Courts below should be affirmed on the grounds that the Secretary abused her discretion by failing to implement the program. Her decision not to implement was an abuse of discretion because she considered irrelevant factors and her decision, viewed in light of the relevant factors, was clearly erroneous. Contract authority has been available and it could have been allocated, if necessary, to the operating subsidy program without jeopardizing the Secretary's alleged other commitments.

The Secretary's refusal to implement the operating subsidy program is subject to judicial review.

## ARGUMENT

The primary issue raised in these consolidated cases is whether the Secretary has a mandatory duty under the National Housing Act, 12 U.S.C. § 1701, *et seq.* (1970 and Supp. V 1975), to make operating subsidy payments. Respondents submit, and the Courts below found, that the provisions of Section 236(f)(3) and (g) are mandatory and that the Secretary had a ministerial duty to implement the program. The Secretary's argument that she has discretion not to implement the operating subsidy program has been "flatly and unequivocally rejected by every court

that has considered the issue."[8] Each of these eighteen Courts reviewed the statutory language, concurrent and subsequent legislative history and determined that the Secretary's failure to pay operating subsidies is unsupportable and frustrates congressional intent.

## I. The Secretary's Refusal to Make Additional Assistance Payments for Operating Subsidies Violates the Mandatory Language of Section 236(f)(3) and (g) and Frustrates Congressional Intent

### A. THE LANGUAGE OF THE STATUTE AND THE OPERATING SUBSIDY FINANCING SCHEME DEMONSTRATE THAT THE PROGRAM IS MANDATORY

Congress required the Secretary to take two steps to set the stage for payment of operating subsidies: first, "[f]or each project there *shall* be established an initial operating expense level" (12 U.S.C. § 1715z-1(f)(3) (Supp. V 1975)) which "for any project assisted under a contract entered into prior to August 22, 1974, *shall* be established by the Secretary not later than 180 days after August 22, 1974" (12 U.S.C. § 1715z-1(g) (Supp. V 1975)); second, charges collected in excess of basic rent must be paid to the Secretary and "*shall* be credited to a reserve fund *to be used* by the Secretary to make additional assistance payments" (12 U.S.C. § 1715z-1(g)) for the operating subsidy program.[9] (Emphasis added.)

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8. *Abrams v. Hills*, 547 F.2d at 1067, *Abrams Cert.* Pet. App. p. 11a and cases cited there. *See also, Abrams v. Hills*, 415 F. Supp. 550; *Battles Farm Co. v. Hills*, 414 F. Supp. 521 (D.D.C. 1976); *Dussault v. Hills*, No. CV 76-147 (D.N.H., Jan. 3, 1977); *Gibson v. Harris*, No. 77-0488-R (E.D.Va., Sept. 30, 1977); *Haas v. Harris*, No. 77-0235 (D.R.I., Aug. 11, 1977); *Lefort v. Hills*, No. 76-0286 (D.R.I., Nov. 19, 1976); *Parker Square Tenants Assn. v. HUD*, No. 75 CV 577-W-3 (W.D.Mo., Jan. 27, 1976); *Sicuro v. Hills*, 415 F. Supp. 553 (C.D.Cal. 1976); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976).

9. These conditions are specifically set out in the statute. They are not plucked from thin air as are the supposed conditions estab-

The purpose of this mandatory framework is to ensure that operating subsidy payments are made. The sole function of the initial operating expense level is to provide the Secretary with a baseline for determining the amount of operating subsidy payments. Congress would hardly have required the Secretary to establish, by a date certain,[10] these expense levels if it did not intend that payments be made. Similarly, the only explanation for maintenance of a separate reserve fund and requiring its use for operating subsidies is that Congress intended that payments be made.

The scheme for expenditure of the reserve fund further reveals that Congress intended that the operating subsidy program be mandatory and that the Secretary should not simply hoard large sums.[11] Not knowing whether the reserve fund would be insufficient or more than sufficient to cover operating subsidy payments, Congress established

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lished by the Secretary. The Secretary reads into the statute a requirement that she must "decide promptly whether to implement the program." If she decides not to implement, then no obligations attach. But if she decides to implement, then, but only then, must she follow the letter and spirit of the statute. *See*, Pet. Br., p. 9, fn. 7. Such a condition precedent simply does not appear in the statute or the legislative history.

10. The fact that Congress mandated a specific date of implementation is significant. There are numerous provisions of the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (HCDA 1974) which are silent as to time of implementation. For example, the Section 236 deep subsidy and interest reduction subsidy programs can be implemented at any time. 12 U.S.C. §§ 1715z-1 (1970 and Supp. V 1975) and 1715z-1 (f)(2) (Supp. V 1975). In addition, Congress has established other programs and allowed HUD more time for implementation. *See*, Section 201(b) of HCDA 1974, 42 U.S.C. § 1437 (Supp. V 1975) (Note).

11. The Secretary states in her brief that as of December 31, 1976, there was $54.4 million in the reserve fund and that it is accumulating at the rate of $12 million per year. Pet. Br., p. 14, fn. 15. Surely Congress intended that that money "be used . . . to make additional assistance payments" for operating subsidies. 12 U.S.C. §1715z-1(g).

a scheme which would cover these possibilities: (1) in the event of a shortfall, Congress authorized the Secretary to use contract authority in addition to the reserve fund[12] and (2) in the event of a surplus in the reserve fund, Congress allowed it to be used for other programs, but only after operating subsidy payments had been made.[13]

### B. THE STATUTORY CONTEXT OF THE PROGRAM AND ITS LEGISLATIVE HISTORY DEMONSTRATE THAT IT IS MANDATORY

The Section 236 federally subsidized housing program was designed "to assist families with incomes so low that they could not otherwise decently house themselves" (12 U.S.C. § 1701t (Supp. V 1975)) and "[f]or the purpose of reducing rentals for lower income families" (12 U.S.C.

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12. In a conference report accompanying the supplemental appropriations act for FY 1975, Congress authorized the Secretary to use available contract authority to make additional assistance payments to cover reserve fund shortfalls. H.R. Rep. No. 1503, 93d Cong., 2d Sess. 5 (1974); S.Rep. No. 1255, 93d Cong., 2d Sess. 8 (1974). In addition, the statute provides that the Secretary pay additional assistance payments for operating subsidies to the extent possible *"up to"* the total amount of the increased operating costs. 12 U.S.C. § 1715z-1 (f)(3). (Emphasis added.)

*See also, Ross v. Community Services, Inc.*, 405 F. Supp. at 836 (D.Md. 1975), *Ross Cert.* Pet. App. pp. 36a-37a in which the Court recognized the power of the Secretary to " 'create reasonable classifications and eligibility requirements in order to allocate the limited funds available to her'," citing *Morton v. Ruiz*, 415 U.S. 199, 230 (1974).

13. In 1974, Congress provided that if the needs of the operating subsidy program were met, the excess money in the reserve fund "shall be credited to the appropriation authorized by subsection (i)" of the Section 236 program and made available to make "assistance payments" (*i.e.*, interest reduction payments). 12 U.S.C. §1715z-1(g). *See, Abrams v. Hills*, 547 F.2d at 1069. *Abrams Cert.* Pet. App. pp. 16a-17a. S. Rep. No. 693, 93d Cong., 2d Sess. 109, *reprinted in* [1974] U.S. Code Cong. & Ad. News 4273, 4375. This provision was expanded by an appropriations act in 1976 to provide that after implementing the operating subsidy program the Secretary could spend the surplus in the reserve fund for a variety of housing programs in addition to the Section 236 interest reduction subsidy program. Department of Housing and Urban Development-Independent Agencies Appropriations 1977, Pub.L. No. 94-378; 90 Stat. 1095, 1096 (1976). *See also*, pp. 25-29, *infra*.

§ 1715z-1(a)). The Secretary's hoarding of over $54.4 million in the reserve fund, her refusal to expend that money to benefit low-income families in federally subsidized housing, and her approval of rent increases to cover increased costs of property taxes and utilities which she should be subsidizing are directly contrary to the intent of Congress in establishing the subsidized housing program. The effect of her refusal to expend the reserve fund is to increase the rental rates paid by low-income tenants or precipitate default and foreclosures of the projects. Congress' intent was exactly the opposite: to decrease, or at least stabilize, the rentals paid by lower income families and to assure the financial viability of the projects.

As evidenced by the legislative history, the refusal of the Secretary to use the reserve fund for operating subsidies is also contrary to the specific intent of Congress in enacting the program.[14] Congress was concerned with the prob-

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14. The Report of the Senate Committee on Banking, Housing and Urban Affairs provided that:

> The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments. While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.
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> Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, . . . and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A), the amount by which the sum of the cost of utilities, . . . and local property taxes exceeds the initial operating expense level,

lem of escalating costs and rents for Section 236 projects, a problem which the interest reduction subsidy program could not ameliorate. Tenants' rents needed to be stabilized without subsidizing inefficient project management. Thus, the operating subsidy program was established to offset the escalating, but objectively ascertainable, costs of utilities and property taxes.

Subsequent legislative history demonstrates congressional adherence to its original intent.[15] In April 1975, the Report of the Senate Committee on Banking, Housing and Urban Affairs accompanying a bill designed *inter alia* to amend the National Housing Act expressed concern that the operating subsidy program was not being implemented and found that at that time there was "*in addition*" to contract authority $44 million in the reserve fund which was "*required*" to be used for additional operating assistance payments.[16]

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or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community. S.Rep. No. 93-693, *supra* at 32. *See also*, H.R. Rep. No. 1279, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code, Cong. & Ad. News 4449, 4475.

15. When the intent is clear, Congress "cannot be put to the necessity of acting twice before it is taken to mean what it said." *Pennsylvania v. Lynn*, 501 F.2d 848, 861 (D.C.Cir. 1974). However, courts have reviewed subsequent legislative history to see if that history sheds any light on the original legislation. 501 F.2d at 857-861.

16. The text provides, in pertinent part, as follows:

The Committee was informed that there is approximately $125 million in unused authority available to provide interest subsidies and operating assistance and, *in addition*, approximately $44 million in reserve as a result of the collection of excess rental charges. The reserve is required under Section

Most recently, in the 1977 Housing and Community Development Act, Congress amended and streamlined[17] the Section 236 operating subsidy provision. The new statute provides that: "[t]he Secretary is authorized to make, and shall contract to make to the extent of moneys in the reserve fund . . ." additional monthly assistance payments. Pub. L. No. 95-128, *reprinted in* H.R. Rep. No. 95-634, *supra* Appendix p. 1. This provision is interpreted by Congress as "direct[ing] the Secretary to make additional assistance payments . . . to the extent of funds in the reserve fund. . . ." *Id.* at 62-63.

There is no doubt that these amendments were adopted to clarify the prior intent of Congress. Numerous Senators and Representatives, speaking in support of a variety of amendments, recognized the mandatory nature of the operating subsidy program and decried the Secretary's con-

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236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act. S.Rep. No. 749, 94th Cong., 2d Sess. 10, *reprinted in* [1976] U.S. Code, Cong. & Ad. News 1885, 1894. (Emphasis added.)

*See also*, S.Rep. No. 93-1255, *supra*, which clarified language of a prior appropriations act.

17. In addition to restating that the operating subsidy program was mandatory and that the reserve fund must be used for its implementation, the 1977 amendments made the following changes: (1) Operating subsidy payments shall be used to reduce basic rents for a project. Henceforth tenants will pay either "basic rent" (12 U.S.C. § 1715z-1(f)(1) (Supp. V 1975); J.A. p. 56) or 25% of their income, whichever is greater. (2) Any contract to make operating subsidy payments shall be for a one-year period with future periodic adjustments. (3) Payments shall be made unless the Secretary finds that the property taxes or utility costs are not reasonable or comparable. (4) Payments made pursuant to the amendments shall be made as of October 1, 1977, although the Secretary has an additional 180 days to establish the initial operating expense levels. *See*, H.R.Rep. No. 634, 95th Cong., 1st Sess. 21-22, 62-63 (1977).

tinuing refusal to implement it.[18] The Congressmen who made these statements were well informed as to the intent of the 1974 Congress. Two of them were Senate conferees for the Housing and Community Development Act of 1974. One of these Senators was the ranking member of the 1974

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18. At least three different amendments were introduced to revise the operating subsidy program—the Pearson amendment, the Hanley amendment and the Chafee amendment.

Senator Pearson, in offering his amendment, co-sponsored by Senator Stone, stated that it "simply seeks to assure that express congressional intention in this area is no longer thwarted." 123 Cong. Rec. S2054 (daily ed., Feb. 2, 1977).

Representative Hanley, on behalf of his amendment, asked for the full support of the House because "[t]his provision . . . is already in the law. HUD has the authority resultant from the amendments to the Act in 1974." He further noted that his amendment represented the "will of . . . [the House] Committee [on Banking, Finance and Urban Affairs]." *Id.* at H4286 (May 11, 1977).

Senator Chafee, in support of his amendment—co-sponsored by Senators Humphrey, Cranston, Javits, Kennedy, Pell and Heinz—stated in answer to the question, "Why should HUD get into [providing operating subsidies for Section 236 projects]?" as follows: "The Act presently provides that they should do it, and HUD has refused to do it." *Id.* at S9042 (June 7, 1977). Senator Cranston, in support of the Chafee amendment, stated that "[d]espite compelling indications that Congress intended that the operating subsidy program be implemented, the former Secretary of HUD refused to pay such subsidies except when required to do so by court order." *Id.* at S9045. Senator Humphrey, also supporting the Chafee amendment, provided background on the 1974 Act by stating that: "In 1974 the Congress responded to the growing problems [in Section 236 projects] by adopting an operating subsidy for Section 236 projects that covered the most rapidly rising costs—that is, the real property taxes and the utility costs. And after we had done this, we were faced with intransigence by the administration—a stolid and unaccountable refusal to use the program." *Id.* Senator Pell, in support of the Chafee amendment, stated that: "I believe the time has come for the Senate to reconfirm its intent that HUD activate this program . . . [W]hen Congress passed the operating subsidy program in 1974 it was clear that HUD was mandated to provide operating subsidy funds for Section 236 housing projects experiencing substantial cost escalations." *Id.* at S9046. Senator Brooke also spoke in favor of the amendment. *Id.* at S9043-S9044.

Senate Subcommittee on Housing and Urban Affairs.[19] Thus, their views are entitled to great weight. *Compare, United States v. United Mine Workers of America,* 330 U.S. 258, 281-282 (1947).

In addition, the 1977 conferees were aware of the pending litigation including a nationwide class action covering all intended beneficiaries of the operating subsidy program. *Underwood v. Hills,* 414 F. Supp. 526. They stated that the position maintained by the Secretary was inconsistent with their prior intent.[20] Thus, they took steps to protect the interests of the Respondents and other Section 236 tenants who are eligible to receive the benefits of the operating subsidy. The conference report to the Housing and Community Development Act of 1977 provides that:

> [t]he conferees intend that these amendments shall not prejudice the rights or liabilities of any party presently before the courts seeking operating subsidy payments pursuant to Sections 236(f)(3) and (g). H.R.Rep. No. 95-634, *supra* at 63.

The only conclusion which can reasonably be drawn from the language of the statute, the contemporary and subsequent legislative history, and the scheme for expenditure of the reserve fund, is that Congress required the Secretary to make operating subsidies "so as to obviate the necessity of raising tenants' rents to cover these increased operating costs." Pet. Br., p. 7.

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19. Senator Proxmire was the ranking member of the 1974 Senate Subcommittee on Housing and Urban Affairs. He is now chairman of that committee. He was also a Senate conferee, along with Senators Cranston and Brooke. Senator Sparkman, the chairman of the 1974 Subcommittee on Housing and Urban Affairs, was also involved in this amendment process. He provided assistance to Senator Chafee in arriving at some of the conclusions supporting the Chafee amendment. *Id.* at S9044. *See,* fn. 18, *supra.*

20. *See,* pp. 23-24, *infra.*

### C. THE SECRETARY'S ARGUMENTS THAT THE OPERATING SUBSIDY PROGRAM IS DISCRETIONARY ARE NOT PERSUASIVE

The Secretary argues that the language of the operating subsidy statute is permissive. Pet. Br., p. 7. In support of her argument, she points first to the contrasting terms used in the deep subsidy program. 12 U.S.C. § 1715z-1(f)(2).[21] Then, relying upon *Pennsylvania v. Lynn*, 501 F.2d 848, she claims that, as with the interest reduction program, she has discretion as to whether the program should be implemented. Respondents will demonstrate that there is no significant difference between the mandatory nature of the deep subsidy and operating subsidy programs and that *Pennsylvania v. Lynn* is inapposite.[22]

The Secretary's comparison of the deep subsidy and operating subsidy program is misleading. It turns solely upon the difference between isolated phraseology in the deep subsidy program—"shall make, and contract to make" —and in the operating subsidy program—"authorized to make, and contract to make." The accepted rule of statutory construction provides that to derive meaning from terms in a statute they must be read in context.[23] When applied here, that rule compels the conclusion that the operating subsidy program, like the deep subsidy program, is a mandatory component of the Section 236 program.

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21. It should be noted that under the Secretary's analysis, the deep subsidy program is mandatory insofar as she uses her available contract authority to construct new Section 236 units.

22. *Abrams v. Hills*, 547 F.2d at 1067-1068, *Abrams Cert.* Pet. App. p. 13a.

23. This Court has recently held that: "[i]n expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) citing *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849).

A comparison of the full text of the two programs reveals that both the deep subsidy and operating subsidy statutes begin with mandatory language. Both statutes contain the term "authorized" within the command matrix. And each program affords the Secretary a limited power to make selected determinations to facilitate the programs' operations such as determining, for the operating subsidy program, whether property taxes and utilities are reasonable and comparable and determining, for the deep subsidy program, whether to increase or decrease the percentage of tenants eligible to receive benefits.

The purposes of both programs are almost identical: to reduce rents to qualified tenants and to provide for an economic mix within each Section 236 project without threatening the solvency or effective management of the projects.[24] While there are distinctions between the programs, they have no impact on their mandatory nature. The deep subsidy program was designed to ensure that every project built after the effective date of the statute (August 22, 1974) would contain approximately 20 per-

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24. The Senate Report accompanying the Housing and Community Development Act of 1974, in introducing the changes in the Section 236 program which included primarily the operating subsidy program and the deep subsidy program, provided that:

> This program . . . grows out of the existing rental housing housing [sic] assistance program (Section 236 of the National Housing Act). However, while it retains features of existing law, it also contains numerous improvements in that law so as to be, in many ways, a new program rather than a simple continuation of the old. It is believed that these changes—including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their control—will help eliminate a variety of problems and permit the program to operate more effectively in the future.

S.R.Rep. No. 93-693, *supra* at 31.

cent lower income families, who would pay reduced rents. The operating subsidy program was designed to aid all eligible tenants in new or existing projects by paying that portion of their rents attributable to increased taxes and utilities. Thus, both of these programs were adopted and viewed together as a comprehensive solution to problems plaguing the Section 236 program. Congress intended that both programs be implemented. It did not intend that one program be selected in favor of the other or that one group of tenants be ignored in favor of another.

The practical explanation for why the programs were written in a slightly different format, as recognized by the Ninth Circuit, is that the deep subsidy program applied only to newly developed projects and the operating subsidy program is applicable primarily to *existing* but also to new projects. In dealing with existing projects, Congress wanted to ensure that the Secretary tightly administer the program and not reward poor management.[25] Thus, it avoided language which would require that *every* project receive an operating subsidy. For new projects, Congress wanted to ensure that every project be developed for at least a percentage of lower income families. Thus, different language was selected for the two programs.[26]

To the extent that increases in a particular project resulted from bad management or discriminatory taxation by a local agency, the Secretary would have discretion under the "authorized" language to deny that project an

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25. *See, Abrams v. Hills*, 547 F.2d at 1068, quoting S.Rep. No. 93-693, *supra* at 32. *See also*, fn. 14, *supra*.

26. Note that under the rent supplement program, which the deep subsidy program replaced, not every Section 236 project was required to be developed with an additional subsidy. *See*, 12 U.S.C. §1701s (Supp. V 1975).

operating subsidy. That limited discretion did not justify an across-the-board refusal to implement the program.

The Secretary also relied upon the District of Columbia Circuit Court opinion in *Pennsylvania v. Lynn*, 501 F.2d 848 to support her contention that the implementation of the operating subsidy program was totally discretionary. Her reliance, however, is misplaced. The *Lynn* Court, by narrowly[27] defining the Secretary's discretion, held that:

> the Secretary has the discretion . . . indeed the obligation to suspend the programs' operation when he has adequate reason to believe that [the programs] are not serving Congress's purpose of aiding specific groups in specific ways, or are frustrating the national housing policies applicable to all housing programs. 501 F.2d at 855-856.

Here, in contrast, the Secretary is claiming discretion not to implement the operating subsidy program because she prefers other programs and she claims that the operating subsidy program is administratively inefficient and that it is inequitable because it fails to benefit a sufficiently broad class of tenants. In fact, the *Lynn* Court itself anticipated this argument and rejected it: "it may be doubted whether mere concern about the equity and efficiency of a program duly established by Congress could, without more, support an executive decision to suspend its operation. . . ." *Id.* at 852.

The *Lynn* decision can also clearly be distinguished on its facts. There, the Secretary asserted authority to suspend a number of the principal housing programs, including the Section 236 interest reduction program. This, he claimed, was justified by a thorough study and evaluation. *Id.* at 861. No study or evaluation has been undertaken or offered to

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27. 501 F.2d at 862.

support the Secretary's determination not to implement the operating subsidy program. The suspension in *Lynn* was further justified because "structural features" of the housing programs, which were not amenable to administrative solutions, frustrated the purposes and intent of the programs. *Id.* at 865, 867. Here the excuse is policy distaste.[28] In addition, it is significant that operating subsidies were designed to help eliminate some of the "structural" problems and make the Section 236 program operate more efficiently. *See,* fn. 24, *supra.* In *Lynn,* suspension of the program was justified because billions of dollars would have been committed over periods up to forty years before congressional approval of the suspension could have been achieved. *Id.* at 856. With operating subsidies, the contracts can be for one year at a time[29] and the amount in the reserve fund is currently estimated to be $54.4 million. Finally, the *Lynn* Court found that continuation of the suspended housing programs would have frustrated the purposes and intent of Congress because the intended beneficiaries were not being helped. Here, in contrast, the Secretary *admits* that operating subsidies achieve the objective of reducing

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28. The Secretary's distaste for the operating subsidy program predates its enactment. HUD Assistant Secretary for housing, Crawford, when asked in a House committee hearing about operating subsidies, said that: "[w]e did not request operating subsidies" and the Secretary will not implement the program. *Department of Housing and Urban Development-Independent Agencies Appropriations for 1976, Hearings on H.R. 9070 before House Committee on Appropriations,* Part 5, 94th Cong., 1st Sess. 275 (1975).

29. *See, Department of Housing and Urban Development and Certain Independent Agencies Appropriations, Senate Hearings before Appropriations Committee, Fiscal Year 1977,* Part 1 Justifications, 94th Cong., 2d Sess. 49-50 (1976); *Department of Housing and Urban Development-Independent Agencies Appropriations for 1977, Hearings on H.R. 14233 before a Subcomm. of the House Comm. on Appropriations,* Part 6, 94th Cong., 2d Sess. 435 (1976) (hereinafter House Appropriations on H.R. 14233).

tenants' rents and subsidizing property taxes and utilities. Pet. Br., p. 7; J.A. p. 39.

The Secretary's argument that neither the interest reduction subsidy nor the operating subsidy programs are compulsory (Pet. Br., p. 9) ignores the long line of "impoundment cases."[30] These cases have recognized that if Congress establishes a program and provides funds, there is a presumption that it intended the program to be implemented absent an *express* statement to the contrary or an *express* statement leaving the question of implementation to the discretion of the executive.[31] The burden, therefore, is upon the executive to demonstrate that Congress granted

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30. "'[I]mpoundment' is an unauthorized executive refusal to expend appropriated funds, or in the words of section 1011 of the Congressional Budget and Impoundment Control Act of 1974, 'withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities' or 'any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority. . . .' Act of July 12, 1974, Pub. L. No. 93-344, § 1101, 88 Stat. 297." Abascal and Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1547, 1551, fn. 6 (1974). It is clear not only from this definition but also from the letters of the Comptroller General of the United States to Congress that the Secretary illegally impounded the reserve fund. H.R. Doc. No. 466, 94th Cong., 2d Sess. (1976); H.R.Doc. No. 558, 94th Cong., 2d Sess. (1976).

31. *See*, for example, *Guadamuz v. Ash*, 368 F. Supp. 1233 (D.D.C. 1973) in which the Court provided that the Secretary of Agriculture could not terminate two different programs because:

> Congress, by authorizing the future obligation of funds by the Secretary of Agriculture, has indicated its intent that the program continue, at least for the period of time authorized. To accept the defendants' position, that absent a mandatory statement that a program be continued or be operated at a certain level, the Executive may terminate the program, would be to place a burden on the Congress not contemplated by our Constitution. 368 F. Supp. at 1241. *See also, Sioux Valley Empire Electric Association, Inc. v. Butz*, 367 F. Supp. 686 (D.S.D. 1973), *aff'd* 504 F.2d 168 (8th Cir. 1974); *Local 2677, American Fed. of Gov't. Emp. v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973).

it discretion not to implement the program. This burden cannot be met by merely stating a conclusion that the "statutory provision contains [no] imperative phrase that would render [the] subsidy compulsory." Pet. Br., p. 9.

## II. The Secretary Need Not Use Contract Authority to Spend the Reserve Fund

Respondents submit that the decision of the Courts below—that the operating subsidy statute provides that the money in the reserve fund is immediately available for use —is fully supported by the language of the statute and the legislative history. Contrary to the position maintained by the Secretary (Pet. Br., pp. 14-15), no contract authority is needed to make expenditures from the reserve fund. The Secretary's analysis fails to recognize that a new funding scheme was created when the operating subsidy program was enacted. Thus, her prior funding precepts are inapplicable here.[32]

The operating subsidy statute provides that all rents collected in excess of basic rents "shall" be accumulated and paid to the Secretary who "shall" credit such money to the

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32. The basic funding scheme for those HUD programs that utilize contract authority is as follows. First, Congress enacts substantive legislation which establishes the program and authorizes that certain sums may be appropriated subject to specific contract limitations. Then, in subsequent appropriations acts, Congress does two things. It releases contract authority which permits the Secretary to enter into contracts with housing owners to pay them subsidies up to a specified maximum over an extended period, normally, forty years. Then it permits the Secretary to pay certain dollar amounts on such contracts during the fiscal year covered by the appropriation act.

The only facets of this procedure that are relevant to Respondents' arguments are that (1) contract authority for HUD programs is only released in appropriations acts and (2) the purpose of contract authority is to permit the Secretary to obligate funds for future years before they are appropriated.

reserve fund "to be used" to make operating subsidy payments. 12 U.S.C. § 1715z-1(g). There is no statutory limitation to the effect that expenditures from the fund can be made only if there is available contract authority. The fact that this statutory language makes the reserve fund money immediately available and dispenses with the need for contract authority is fully supported by statutory changes made by the 1974 amendments.

The reserve fund was established in 1968. From that time until August 22, 1974, the statute provided that the fund "may be used" to make Section 236 interest reduction subsidy payments. Any such use was made "subject to limits approved in appropriations acts."[33] This limitation and the Secretary's discretion to use the fund for interest reduction payments were removed in 1974 when the operating subsidy program was created. Congress thereby created a self-perpetuating, revolving fund free from the limits of appro-

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33. The law prior to August 22, 1974, provided as follows:
(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be deposited by the Secretary in a fund which *may be used* by him as a revolving fund for the purpose of making interest reduction payments with respect to any rental housing project receiving assistance under this section, *subject to limits approved in appropriation Acts pursuant to subsection (i)*. Moneys in such fund not needed for current operations may be invested in bonds or other obligations of the United States or in bonds or other obligations guaranteed as to principal and interest by the United States or any agency of the United States: *Provided*, That such moneys shall to the maximum extent feasible be invested in such bonds or other obligations the proceeds of which will be used to directly support the residential mortgage market. Housing and Urban Dev. Act of 1968, Pub. L. No. 90-488, § 201(a), 82 Stat. 476, 499 (1968), as amended by Housing and Urban Dev. Act of 1970, Pub. L. No. 91-609, §117(c), 84 Stat. 1770, 1774 (1970). (Emphasis added.)

priations acts[34] and made the money immediately available for operating subsidies.

Moreover, the operating subsidy program, when funded by the reserve fund, is fundamentally different from programs which use solely contract authority. Contract authority is essential when the government wishes to obligate itself, prior to an appropriation, to make payments for the current as well as future years. J.A. pp. 50, 53. If, however, the money is available prior to the creation of the obligation, contract authority is not necessary. In the case of the reserve fund, millions of dollars have been available since 1974. All Respondents ask is that this money be spent as Congress intended. No contract authority is necessary. The cash is in hand. Thus, agreements to make payments will not exceed the ability of the Secretary to pay.

Congress has expressly recognized that the reserve fund is separate from contract authority. The conference report accompanying the 1977 Housing and Community Development Act, Pub. L. No. 95-128, provided that:

> The conferees are further aware that HUD has asserted in litigation that it does not have sufficient contract authority to make such [operating subsidy] payments to the full extent of monies in the reserve fund. These amendments are intended *to clarify* that while the Secretary is authorized to enter into contracts with project owners to make such payments, no contract authority is needed to spend the reserve funds

34. The existence of a self-perpetuating fund that is not dependent upon congressional appropriations, and hence is not subject to the usual budgetary process, is not unique to the operating subsidy program. *See, Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir. 1945) which recognized that milk funds accumulated by assessment are not subject to appropriations; and *Emery v. United States*, 186 F.2d 900, 902 (9th Cir. 1951) which held that rent overcharges collected from landlords by the federal government in trust for the tenants were not subject to appropriations.

for operating subsidies. H.R.Rep. No. 95-634, *supra* at 63. (Emphasis added.) *See also*, S.Rep. No. 749, 94th Cong., 2d Sess. 10 (1976).

That contract authority need not be used is also supported by the statutory language which gives the Secretary the authority "to make and contract to make" operating subsidy payments. 12 U.S.C. § 1715z-1(f)(3). Respondents submit that this language, as the Ninth Circuit found, permits the Secretary to "make payments not under contract" and thus without regard to contract authority.[35] Furthermore, Respondents submit that even if the Secretary made payments pursuant to "contracts," this fact does not require the utilization of "contract authority." The Secretary administers several programs in which contracts are used, money obligated and no contract authority is utilized.[36]

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35. *See, Abrams v. Hills*, 547 F.2d at 1068 fn. 11, 1071, *Abrams Cert.* Pet. App. p. 14a fn. 11, 21a-22a. The Court in *Dubose* aptly noted that a comparison of the language of the public housing statute further supported this analysis. *See, Dubose v. Hills*, 405 F. Supp. 1277, 1283-1284 fn. 32, 1287 fn. 46.

36. The following programs authorize the Secretary to enter into contracts and expend money for housing programs. No contract authority is obligated under these programs, as is demonstrated in HUD's budget justifications submitted to the House Subcommittee on Appropriations. *See*, Housing counseling assistance program, 12 U.S.C. § 1701x(a) (Supp. V 1975), *Department of Housing and Urban Development-Independent Agencies Appropriations for 1978, Hearings before a Subcomm. of the House Comm. on Appropriations*, Part 6, 95th Cong., 1st Sess. 599-603 (1977) (hereinafter, House Appropriation Hearings, HUD 1978); Mobile home standards program research, 42 U.S.C. § 5407 (Supp. V 1975), *Id.* pp. 604, 606, 662; New technologies in the development of housing for lower income families, 12 U.S.C. §§ 1701z-2(e), 1701z-6 (Supp. V 1975), *Id.* pp. 625, 664, 684; Experimental housing allowance program (EHAP)—demand experiment, 12 U.S.C. § 1701z-3 (Supp. V 1975), *Id.* pp. 656-657; Fair housing program, 42 U.S.C. § 3608(d) (1970), *Id.* p. 724.

The Secretary's interpretation of the 1974 amendments makes little practical, political or fiscal sense. She first admits that they provide "that the reserve fund was to be available only to make operating subsidy payments." Pet. Br., pp. 13-14. Then she concludes that the amendments "simply limited the purpose for which the fund could be used and prevented its return to the Treasury or its commingling with appropriated funds for use in other housing programs." Pet. Br., p. 18. Under this view, the millions of dollars in the reserve fund would stand in limbo, to be used at the Secretary's whim or caprice.

This view both defies reason and contrasts starkly with the legislative history. Congress was aware that the reserve fund had been accumulating since 1968. The Secretary had not used it to make interest reduction subsidy payments. Thus Congress, eager to have the money spent, mandated its immediate release primarily for operating subsidies. Even the Secretary's ability to invest the reserve fund to support the residential mortgage market was removed. *See*, fn. 33, *supra*.[37]

The Secretary further argues her position is supported by Pub. L. No. 94-378 which makes surplus money in the reserve fund available for use in other programs. Pet. Br., p. 17. The Secretary misconstrues the statute and misreads the legislative history. Pub. L. No. 94-378, which is an appropriations act and thus of limited scope,[38] makes avail-

37. The Secretary's argument further ignores the fact that the interpretation of the need for contract authority for the operating subsidy program was developed through affidavits in the course of litigation. Thus no special weight should be accorded. *See, Davis Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944). *See also Morton v. Ruiz*, 415 U.S. at 237; *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Baltimore & Ohio R.R. Co. v. Jackson*, 353 U.S. 325, 331-332 (1957).

38. *See, United States v. Vulte*, 233 U.S. 509, 514 (1914).

able money in the reserve fund for other housing programs if and when the needs of the operating subsidy program have been met. It does not, as contended by the Secretary, eliminate the requirement in the substantive legislation, that the fund be employed for operating subsidies nor does it demonstrate that the reserve fund is simply a substitute for appropriated funds and therefore requires contract authority to be expended. In pertinent part, the law contains the proviso "[t]hat excess rental charges credited to the Secretary in accordance with Section 236 (g) of the National Housing Act, as amended, shall be available . . . for the payments on contracts entered into pursuant to the authorities enumerated above." *Id.* 90 Stat. 1095, 1095 (1976). One of the enumerated authorities is the Section 236 program which includes, of course, the operating subsidy program.

The only effect of this proviso is to expand the Secretary's discretion over expenditures from the reserve fund once the needs of the operating subsidy program are fully met. Under the 1974 amendments, the excess in the reserve fund not needed for operating subsidies could only be used for the interest reduction subsidy program.[39]

The fact that Congress did not intend by the proviso contained in Pub. L. No. 94-378 to undercut the mandatory nature of the operating subsidy program and expected to see it implemented with the reserve fund is evident from the legislative history. The proviso itself originated in the House; when it reached the Senate, Senator Sparkman, then

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39. Pub. L. No. 94-378 does not, as claimed by the Secretary, indicate "Congress' disenchantment with the operating subsidy program" (Pet. Br., p. 20 fn. 20), but rather evidences Congress' frustration with the refusal of the Secretary to spend the reserve fund. Hence the statutory requirement that the money *"shall be available."* Pub. L. No. 94-378, 90 Stat., *supra* at 1095.

chairman of the Committee on Banking and Currency, stated that:

> HUD has failed to carry out [the operating subsidy program] despite the specific legislative authority conferred 2 years ago, despite the fact almost $25 million[40] in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision.
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> . . . [T]he General Accounting Office has informed HUD that the accumulated section 236 funds are covered by the Impoundment Control Act, and that, in the absence of a recision approval by the Congress, these funds must be obligated in accordance with the provisions of the 1974 act. HUD has failed to obligate the funds. I am informed that the GAO is now considering legal action in order to require HUD to follow the requirements of the Impoundment Control Act.
>
> Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 236(g). 122 Cong. Rec. S10775 (daily ed., June 26, 1976).

Senator Proxmire, floor manager for the bill, agreed that "[i]t is most important that we do our very best to keep the section 236 tax and utility subsidy program going. It is a good program. It is for low-income people." *Id.* Thus, the Senate struck the contested proviso.

When the 1976 appropriations bill was reported out of the Conference Committee it did, however, contain the House version of the proviso. The Senate had agreed to the

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40. As of June 26, 1976, there was at least more than $40 million in the reserve fund. J.A. pp. 55, 59, 164, *see also*, p. 38 fn. 56, *infra*.

proviso in exchange for Conference Committee report language that protected the rights of Section 236 tenants and others who had or would file suit. To protect the rights of those people, the conference report provided in pertinent part that:

> Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.
>
> The Committee of conference is agreed that *this action shall not prejudice any suit now or hereafter before the courts in this area.*
>
> H.R. Rep. No. 1362, 94th Cong., 2d Sess. 5 (1976). (Emphasis added.)

Since Congress knew of the pending lawsuits brought by tenants and Section 236 project owners, the Conferees clearly intended to ensure that the tenants and project owners would receive the benefits of operating subsidies.

This construction of the 1974 amendments and Pub. L. No. 94-378 is consistent with general principles of statutory construction. This Court has declared that where there are two statutes enacted on the same subject they shall be interpreted so as to give effect to both. *United States v. Borden,* 308 U.S. 188, 198 (1939); *Morton v. Mancari,* 417 U.S. 535, 551 (1974). There is a presumption against construing a statute so as to render it ineffective. *Bird v. United States,* 187 U.S. 118, 124 (1902); *Blanchette v. Connecticut General Insurance Corp.,* 419 U.S. 102, 134 (1974). However, if there is a positive repugnance between the two acts then an implied repeal "is to be regarded only if necessary to make the [later enacted law] work and even then

only to the *minimum* extent necessary . . . ." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). (Emphasis added.)

The Secretary attempts to explain away the importance of this "no prejudice" language by claiming that the provision "means no more than that the availability of the reserve fund for other Section 236 programs after October 1, 1976, does not affect the right of litigants such as respondents to be paid from the reserve fund if they prevail on the merits." Pet. Br., p. 18 fn. 19. But this conclusion is inconsistent with the facts. Neither the House nor Senate version of the act ever contemplated that the proviso would nullify the mandatory nature of the operating subsidy program or that first priority for use of the reserve fund for that program would be removed. The reserve fund is still available to make operating subsidy payments. Furthermore, the proviso of Pub. L. No. 94-378 was agreed to by the conferees only after assurances that claims of past, present and future tenants would be preserved.[41]

Thus Respondents submit that the program is mandatory and that no contract authority is necessary for the release of the reserve fund.

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41. Even under the Secretary's interpretation, the *Abrams* Respondents would be entitled to operating subsidy payments from at least February 18, 1975, to October 1, 1977; whereas the *Ross* Respondents would be entitled to payments from May 1, 1975, to October 1, 1977. *See also*, 1 U.S.C. § 109 (1970), the general savings clause.

*Compare, Train v. City of New York*, 420 U.S. 35, 41-42 (1975) in which this Court, interpreting similar "no prejudice" language, found that pending suits were exempt from coverage of the act in question. Here, because of the nationwide suit *Underwood v. Hills*, 414 F. Supp. 526, all past, present and future tenant claims are pending and were pending at the time Pub. L. No. 94-378 was enacted.

*See also, Dubose v. Hills*, 420 F. Supp. 399, 402-403 (D. Conn. 1976) and *Abrams v. Hills*, 547 F.2d at 1071-1072, *Abrams Cert.* Pet. App. 20a-22a.

## III. If the Secretary Possessed Discretion, She Abused that Discretion

Respondents believe that the operating subsidy program is mandatory and that no contract authority is necessary to spend the reserve fund. If this Court rejects that view, Respondents submit that the Secretary's failure to implement the program and allocate sufficient contract authority so that the reserve fund could be spent constitutes an abuse of discretion. Thus the judgments of the Courts below should be affirmed.

This Court, in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), set out the standard for review of agency action to determine abuse of discretion. In it a two-pronged test for reviewing agency action was established. It must first be determined whether the action was "within the scope of . . . authority"[42] and, second, whether the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. "To make this [latter] finding the Court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." 401 U.S. at 416.

### A. THE SECRETARY IN DECIDING NOT TO IMPLEMENT THE PROGRAM CONSIDERED IRRELEVANT FACTORS

The Secretary and members of her staff have filed several affidavits attempting to justify her decision not to implement the program. Some of the reasons offered are patently absurd. For instance, she has stated that she will

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42. 401 U.S. at 415. For purposes of this discussion, Respondents are assuming that the decision not to implement the program was within the scope of the Secretary's authority. *But see,* pp. 6-14, *supra.*

not implement the program because (1) it is designed only to assist Section 236 projects (J.A. pp. 44, 157); and (2) the program will assist only projects in which tenants pay more than 25-30% of their adjusted incomes for rent (J.A. pp. 44, 157). In other words, she refuses to implement because to do so would achieve precisely the result intended by Congress. If these factors are considered "relevant" the legislative process has lost all meaning.

The Secretary also claims that implementation "would be excessively costly." Pet. Br. p. 23. The record is bare of any showing to support this claim. It was never raised below and there is absolutely nothing to suggest that it was one of the "relevant factors" considered by the Secretary in making her decision. It is a *post hoc* rationalization which this Court should disregard.[43]

Even assuming that these unsupported assertions of excessive costs are properly before this Court, Respondents submit that they are the consequence of deliberately positing an administrative scheme substantially more burdensome than is required. The Secretary claims that implementation requires constant recalculations including "a monthly review of all [tenant] income data." Pet. Br., p. 23 fn. 23. Rational administration imposes no such requirement. Tenant incomes may have to be adjusted and project owners may have to submit periodic reports, but the income data for all tenants need not be reviewed

43. The affidavits relied upon by the Secretary to make her administrative burden argument were developed in response to litigation. These facts have been presented only to this Court. There has been no opportunity to challenge or cross-examine the assertions. Thus these facts should not be considered by this Court. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948). But if received they must be viewed critically as *post hoc* rationalizations. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 420.

monthly. The Secretary administers many housing programs for which a tenant or a homeowner receives a subsidy based upon a percentage of income. None of these programs, including the Section 236 interest reduction program, requires the project owners or mortgagees to review each family's income monthly. For these programs, annual or biennial reviews with emergency hardship reassessment are deemed sufficient.[44] In short, the Secretary created a straw person, set it ablaze and hoped that it would send the entire program up in smoke.

As a final—and preposterous—"relevant factor" supporting her decision not to implement, the Secretary cites the burden of running two programs—the 1974 operating subsidy program and the 1977 operating subsidy program—and having to locate former tenants in order to make back payments to them. Pet. Br., p. 24 fn. 23. In other words, she seeks to sustain a continuing violation of the law by relying on her prior lawlessness. To uphold her exercise of discretion on these grounds would be to sanction executive sabotage of the legislature. Moreover these allegations are untested and they are made for the first time here. There is nothing in the record to support them. Thus Respondents submit that the Secretary's decision not to implement the program cannot be sustained because it is based upon factors that are not only irrelevant, but also absurd.

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44. *See*, Section 236 interest reduction subsidy program, 12 U.S.C. § 1715z-1, 24 C.F.R. § 425.25; Section 236 deep subsidy program, 12 U.S.C. § 1715z-1(f)(2), 24 C.F.R. § 426.60; Section 101 rent supplement program, 12 U.S.C. § 1701s, 24 C.F.R. §§ 215.55, 215.60; Conventional public housing, 42 U.S.C. § 1437 *et seq.* (Supp. V 1975), 24 C.F.R. § 866.4(c); Section 8 housing assistance payment program, 42 U.S.C. § 1437f (Supp. V 1975), 24 C.F.R. §§ 880.222, 881.222, 882.212, 883.322, 886.124; Section 235 homeownership program, 12 U.S.C. § 1715z (1970 and Supp. V 1975), 24 C.F.R. § 235.10(c)(1).

## B. THE SECRETARY'S DECISION NOT TO IMPLEMENT THE PROGRAM CONSTITUTED A CLEAR ERROR OF JUDGMENT

### 1. The operating subsidy program was specifically tailored to alleviate problems in the Section 236 interest reduction program and should have been implemented

The Secretary claims that her exercise of discretion was proper because it was reasonable to decide to honor *bona fide* commitments to produce new Section 236 rental units to the exclusion of the operating subsidy program. Pet. Br. p. 21. This argument collapses, of course, if the Court finds, as Respondents believe it should, *either* that contract authority need not be used to pay operating subsidies *or* that the Secretary had sufficient contract authority to meet interest reduction subsidy and deep subsidy commitments as well as operating subsidy program needs.

The Secretary's conclusion defies her own experience and demonstrates that her judgment was clearly erroneous. In 1973, the Secretary suspended the Section 236 program because of "structural problems" inherent in the program. The Secretary had determined that because the Section 236 interest reduction program was a fixed subsidy it was unresponsive to inflation, the utility crisis and escalating costs. As a result, the intended beneficiaries of the Section 236 program—lower income families—were not being assisted. Rents were too high and project owners tended to prefer higher income families. In addition, the program as a whole had a ten-year projected default rate of 20%.[45]

Congress, favoring a continuation of the Section 236 program, responded to these problems in 1974 by amending

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45. *See, Pennsylvania v. Lynn*, 501 F.2d at 865, 867; *Housing in the Seventies*, Report of the Department of Housing and Urban Development, *reprinted in Housing and Community Development Legislation—1973, Hearings before the Subcomm. on Housing of the House Comm. on Banking and Currency*, Part 3, 93d Cong., 1st Sess. (1973).

it to add the operating subsidy and deep subsidy programs. J.A. p. 39. The operating subsidy program in particular was designed to assist existing (as well as new) projects by increasing the subsidy, reducing rents and offsetting the cost of property taxes and utilities. *See,* p. 10, fn. 14, *supra*; J.A. pp. 39-40. In light of this history, it makes no sense for the Secretary to continue building Section 236 projects without providing them with operating subsidies which would help assure their success. Furthermore, by ignoring the needs of the existing Section 236 projects[46] she is reinforcing a pattern of escalating rents, defaults and foreclosures. Thus, in the name of production, the Secretary is building units which are actuarily unsound and ignoring the existing units, thereby promoting their withdrawal from the low-income housing market.

The Secretary, in her brief, further attempts to justify her production preference by claiming that she is merely following congressional desires.[47] Pet. Br., p. 22. However,

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46. The Secretary claims that she is assisting some of the Section 236 projects by providing Section 8 assistance, 42 U.S.C. § 1437f. This assistance, however, is insufficient to meet the needs of all of the projects eligible to receive operating subsidy payments. The Secretary estimates that there are over 400,000 Section 236 units. While over 111,000 units have been provided with Section 8 assistance, only approximately 79% of them were used for Section 236 projects. Pet. Br., p. 23 fn. 22. *See, Section 8 Housing Assistance Payments Program: The Loan Management Set-Aside,* Department of Housing and Urban Development, 17 (January 1977).

47. This is another justification that does not appear in any affidavit filed in these cases. It is merely counsel's *post hoc* rationalization which is entitled to no weight. *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-169 (1962).

Significantly, just two paragraphs before this statement, the Secretary states that her decision not to allocate contract authority to the operating subsidy program was reasonable because she "lack[ed] a clear statement from Congress as to its preference between the interest reduction and operating subsidy programs." Pet. Br., p. 20. The Secretary seemingly creates congressional preferences at whim.

the Secretary's reading of the legislative history is incomplete. It is true that Congress wanted the Section 236 program reactivated and production commenced. But there is no indication that it preferred the old, non-operating subsidy Section 236 program over the new Section 236 program. Congress wanted new construction with the new program: a Section 236 program with deep subsidies as well as operating subsidies.[48] Also, congressional concern over the failure of the Secretary to implement the operating subsidy program has been strong and consistent.[49] Thus, the Secretary's analysis that the production of Section 236 units was preferred over the implementation of the operating subsidy program is inconsistent with express congressional intent. It further demonstrates the unsoundness of her judgment.

**2. Contract authority was available and should have been allocated**

The Secretary alleges that she had insufficient contract authority to implement the program and spend the reserve fund. J.A. pp. 39, 155. This claim is inconsistent with the facts. She had contract authority available which she either did not use or allocated erroneously.

The Secretary improperly allocated more contract authority to the deep subsidy program than was intended by Congress. She is required to use the deep subsidy program for all Section 236 projects for which interest reduction subsidy contracts are entered into after August 22, 1974. For pre-August 22, 1974 projects, the rent supplement program was to be used.[50] Despite congressional instruc-

48. *See*, fn. 24, *supra* and S.Rep. No. 93-1255, *supra*.

49. *See*, 9-14, *supra*.

50. Congress specifically increased the available contract authority for the rent supplement program so that the Secretary would not have to use deep subsidies for pre-August 22, 1974 projects. *See*, Department of Housing and Urban Development-

tions to distinguish the pre- and post-August 22, 1974 projects, the Secretary allocated $2.9 million of contract authority to make deep subsidy payments to pre-August 22, 1974 projects. J.A. pp. 37-38. Indeed, she admits that more contract authority would have been allocated for this purpose if it had been available. J.A. p. 38.[51]

For each fiscal year since 1975, the Secretary estimated that she would have unused contract authority available. Her predictions were accurate.[52] This contract authority should have been allocated to the operating subsidy program and used to spend the reserve fund. If it had been, the

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Independent Agencies Appropriations Act, 1976, Pub. L. No. 94-116, 89 Stat. 581, 582 (1975); H.R.Rep. No. 313, 94th Cong., 1st Sess. 6 (1975); S.Rep. No. 326, 94th Cong., 1st Sess. 16 (1975).

51. Respondents believe that the Secretary may have allocated more contract authority to the pre-August 22, 1974, Section 236 projects. In an affidavit filed in *Ross*, it is stated that, as of July 1, 1974, there was $181.36 million of unreserved contract authority, $28.2 million of which was programmed for deep subsidies. J.A. pp. 51-52. The Secretary, in her brief, now claims that at the beginning of fiscal year 1976 there was approximately $125 million of contract authority, $50 million of which was reserved for the deep subsidy program. Pet. Br., pp. 10-11. Because these latter facts are before this Court for the first time in these cases, Respondents have had no opportunity to challenge them. But we believe there may be an unwarranted increased allocation of $21.8 million of contract authority to the deep subsidy program.

52. The following table summarizes the Secretary's own figures regarding availability of contract authority:

| | Spring '75 | 6/30/75 | Spring '76 | 6/30/76 | Spring '77 | 9/30/76 |
|---|---|---|---|---|---|---|
| | (Figures in Thousands) | | | | | |
| Estimated Available Contract Authority | $73,163* | | $23,000† | | | $11,000§ |
| Actual Available Contract Authority | | $125,000† | | $38,453§ | $35,409§ | |

**Department of Housing and Urban Dev.-Independent Agencies Appropriations for 1976, Hearing on H.R. 9070 before a Subcomm. of the House Comm. on Appropriations*, Part 5, 94th Cong., 1st Sess., 163 (1975).

†House Appropriation Hearings on H.R. 14233, *supra* at 351.

§House Appropriation Hearings, HUD 1978, *supra* at 309.

operating subsidy program could have been implemented even on the Secretary's terms.

Operating subsidy contracts are short term, usually for one year.[53] Thus the contract authority allocated to those contracts would be recaptured at the end of each fiscal year. "Recapture" of Section 236 contract authority is a familiar principle, applied by the Secretary to the interest reduction subsidy program when, for example, a project is sold, foreclosed or a contract is otherwise terminated.[54] She has also applied this principle to those operating subsidy contracts reluctantly entered into pursuant to Court order. As those yearly operating subsidy contracts expire, the contract authority utilized for one year becomes available for allocation in the succeeding fiscal year, either to honor deep subsidy and interest reduction commitments or to make further operating subsidy payments.[55] Thus, the Secretary could have implemented the operating subsidy program and met all her *bona fide* commitments.[56]

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53. House Appropriation Hearings on H.R. 14233, *supra* at 435.

54. *See*, 12 U.S.C. § 1715z-1(i) which provides that the amount of contract authority available to the Secretary after release in appropriations acts is limited only to the extent of "outstanding" contracts. *See also*, S.Rep. No. 1216, 91st Cong., 2d Sess. 5 (1971); *Recapture of Rent Supplement Contract Authority*, Memorandum to Patricia R. Harris, Secretary, from Ruth T. Prokop, August 11, 1977.

55. In other words, if $23,000 is contracted for and liquidated in fiscal year 1975, $23,000 of contract authority is used in fiscal year 1975 but available for reallocation in fiscal year 1976. In contrast, the contract authority would not be available for reallocation in fiscal year 1976 if the $23,000 represented annual payments for a forty-year period of time. In this latter situation, the contract authority utilized would be available again only at the end of the 40-year period or when the contract was terminated. *See also*, fn. 29, *supra*.

56. Significantly, if the Secretary had used available contract authority *in addition to* the money in the reserve fund the operat-

## IV. The Secretary's Determination Not to Implement the Operating Subsidy Program Is Subject to Judicial Review

The Secretary's penultimate and least convincing argument is that the exercise of her discretion in allocating available housing resources is subject to review only by "the President and not by the courts." Pet. Br., p. 5. This same argument was raised in both *Train v. City of New York*, 420 U.S. at 46, and *Train v. Campaign Clean Water, Inc.*, 420 U.S. 136, 138 (1975). This Court did not even consider the argument worthy of comment.

This claim must fail because the Secretary has not carried the heavy burden required to sustain a claim of non-reviewability. The Administrative Procedure Act, 5

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ing subsidy program could have been fully implemented for each year and there would still be a remainder of over $10 million in the reserve fund as of September 30, 1977. This point can be graphically demonstrated by using figures supplied by the Secretary. For fiscal year 1975, the estimated cost to implement the operating subsidy program nationwide was $2,717,000 per month or approximately $12 million for February 18-June 30, 1975. J.A. p. 38. In fiscal year 1976, the cost estimate increased to $51.4 million yearly or approximately $4.3 million per month. J.A. pp. 38, 39. No figures are available for the transition quarter, July 1-September 30, 1976, but assume $4.3 million per month or approximately $13 million. In fiscal year 1977, the need diminished to $43 million yearly. *See*, Pet. Br., p. 12 n. 13. The reserve fund has been estimated throughout this litigation to be $31,556,312, May 9, 1975 (J.A. pp. 50, 53); $37,823,293, August 31, 1975 (J.A. pp. 151, 161, 164); $40,647,789, October 31, 1975 (J.A. pp. 55, 59, 164); $54.4 million, December 31, 1976, and accumulating at the rate of $12 million a year (Pet. Br., p. 14).

The need for $12 million for fiscal year 1975 could easily have been met from the $125 million in contract authority. For fiscal year 1976, the estimated $51.4 million need could have been met with $38.4 million of contract authority plus $13 million from the reserve fund. The $13 million need for the transition quarter could have been met entirely from available contract authority and the estimated $43 million need for fiscal year 1977 could have been met with the estimated $11 million of contract authority plus $31.8 million from the reserve fund. If this were done there would still be available well over $10 million in the reserve fund ($54.4 million minus $44.8 million plus accumulations of $1 million per month since December 31, 1976).

U.S.C. § 701 *et seq.* (1970) provides that actions of federal agencies are subject to judicial review—"except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701. Obviously, Congress has not expressly precluded judicial review.[57]

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 this Court stated that the "committed to agency discretion" exemption is applied only where "statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410. In these cases there is a clear, straightforward and specific law to apply: the operating subsidy provision. It tells the Secretary what to do—use the reserve fund for operating subsidy payments—and how to do it—establish an initial operating expense level. Thus, the Secretary cannot elude judicial oversight by this route.

The Secretary further contends that her discretion may not be judicially overridden because it involves evaluation of national housing needs and predictions about the relative effectiveness of alternatives available for meeting those needs. However, no such wide ranging endeavor was contemplated by the operating subsidy statute. Congress made the determination that the program be implemented and provided funds with which to do so. It clearly did not intend that the national housing needs be ignored or that the exploration of other housing alternatives be precluded. But the very existence of the operating subsidy statute, coupled with Congress' continuing support in the face of

57. To hold that Congress has precluded review, there must be a "showing of 'clear convincing evidence' of a . . . legislative intent to restrict review." *Abott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). *Compare*, 12 U.S.C. § 1735b(e) (Supp. V 1975) in which judicial review is specifically precluded.

the Secretary's recalcitrance, demonstrate a clear congressional directive to implement. *See,* pp. 7-14, *supra.*

The cases cited by the Secretary do not support her position. Significantly, in none of the cases did the Court refuse to review the particular administrative action. In short, the cases are, if anything, supportive of Respondents' position. Both *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803) and *United States ex rel Redfield v. Windom,* 137 U.S. 636 (1891) provide that the executive may be compelled to act if the duty to be performed is ministerial. *National Broadcasting Co. v. United States,* 319 U.S. 190, 224 (1943) further elaborates on this principle by providing that the Court's duty in reviewing agency action for an abuse of discretion is limited to finding that the action is pursuant to authority granted by Congress and based on findings supported by evidence. And, finally, in *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134 (1940), this Court, in defining the relationship between administrative agencies and the judiciary, held that the Courts may correct an agency's interpretation of the law, but can only require compliance with that interpretation in a manner that does not interfere with the agency's exercise of its statutory duties. 309 U.S. at 145.

Respondents, for purposes of their argument, do not quarrel with these principles of law. In fact, they submit that these principles support their position: that Courts have a duty to review agency action to assure that it comports with the statute and, further, to enforce compliance if it is found that the executive has violated the statute. Respondents submit that the operating subsidy is mandatory and the Secretary's failure to implement it is subject to judicial review.

## CONCLUSION

For the reasons stated above, Respondents respectfully submit that this Court should affirm the decisions of the Fourth and Ninth Circuits if it finds that the operating subsidy program was mandatory or that the program is not mandatory but the Secretary abused her discretion in failing to implement it. Alternatively, if this Court finds that the program is not mandatory and the record is insufficient to determine whether the Secretary has abused her discretion then the cases should be remanded to either the District Court for further findings on the "full administrative record before the Secretary at the time [she] made [her] decision" (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402) or to the Secretary "for further consideration" (*Camp v. Pitts*, 411 U.S. 138, 143 (1973)).

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*Counsel wish to acknowledge the important contributions of law students David J. Meadows and Kathleen Reilley in the preparation of this brief.

## *Appendix*

Pub. L. No. 95-128 (October 12, 1977) amends 12 U.S.C. § 1715z-1(f)(3) and (g) as follows (repealed law is enclosed in brackets, new matter is printed in italics, existing law in which no change is made is shown in Roman):

(f)(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable to the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. [At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments.] *The Secretary is authorized to make, and shall contract to make to the extent of the moneys in the reserve fund, established under subsection (g) and to the further extent of funds authorized in appropriation Acts, an additional monthly assistance payment to the project owner up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level. Such payment shall be used by the project owner*

*solely to effect, and there shall be, a reduction in the basic rental charges for the project. Any contract to make additional monthly assistance payments shall be for a one-year period and shall be adjusted periodically to provide, to the extent approved in appropriation Acts, for continuation of the payments and for an appropriate adjustment in the amount of the assistance payments.* Additional assistance payments shall be made pursuant to this paragraph [only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is] *unless the Secretary finds that the increase in the cost of utilities or property taxes is not reasonable or not* comparable to cost increases affecting other rental projects in the community.

(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, [1974] *1977*, shall be established by the Secretary not later than 180 days after August 22, [1974] *1977*.

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IN THE

# Supreme Court of the United States

October Term, 1977
Nos. 76-1234 and 76-1261

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
*Petitioners,*

*vs.*

BARBARA ROSS, ET AL.,
*Respondents,*

PATRICIA R. HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.,
*Petitioners,*

*vs.*

HILDA ABRAMS, ET AL.,
*Respondents.*

**On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits.**

**Brief for Nationwide Tenant Class in Underwood v. Hills, Statewide Tenant Class in Dubose v. Hills, the National Tenants Organization, People United to Save Humanity, and the National Conference of Catholic Charities, as Amici Curiae.**

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**On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits.**

## Brief for Nationwide Tenant Class in Underwood v. Hills, Statewide Tenant Class in Dubose v. Hills, the National Tenants Organization, People United to Save Humanity, and the National Conference of Catholic Charities, as Amici Curiae.

### Interest of Amici Curiae.

The nationwide class of Section 236 tenants in *Underwood v. Hills,*[1] the statewide class of such tenants in Connecticut in *Dubose v. Hills,*[2] the National Ten-

[1] *Underwood v. Hills,* 414 F.Supp. 526 (D.D.C. 1976), *appeal pending* Nos. 76-1603 and 76-1650 (D.C. Cir.), *stay ordered sub nom. Underwood v. Harris,* 429 U.S. 892 (1976).

[2] *Dubose v. Hills,* 405 F.Supp. 1277 (D. Conn. 1975), 420 F.Supp. 399 (D. Conn. 1976), *appeal pending* Nos. 76-6107 and 76-6181 (2d Cir.).

ants Organization, People United to Save Humanity, and the National Conference of Catholic Charities appear as *amici curiae* with the consent of all parties given in letters which have been filed with the Clerk of this Court. The interest of each *amicus* is briefly summarized below.

The class certified by the District Court in *Underwood* consists of all tenants residing in Section 236 projects in the nation—approximately 232,000 families —who the United States Department of Housing and Urban Development (hereinafter referred to as "HUD") estimates are eligible to receive operating subsidies pursuant to 12 U.S.C. §1715z-1(f)(3) and (g). The statewide class of tenants in *Dubose* consists of all low-income people eligible for operating subsidy payments residing in one hundred and one Section 236 projects in Connecticut. The issues raised in both *Underwood* and *Dubose* are identical to those presented in the instant cases—whether the Secretary of HUD is required to implement the operating subsidy program mandated by Congress in 1974.

The District Court in *Dubose* concluded that the tenants would suffer irreparable harm if operating subsidies were not paid since the named plaintiffs would have been required to pay from 52% to 92% of their monthly incomes for rent. The District Court in *Underwood* made a similar finding and concluded that the Secretary's refusal to implement the operating subsidy program would force tenants either to pay increased rents out of funds needed to purchase other basic necessities of life or be evicted from federal housing built for them. 414 F.Supp., at 530-31.

The National Tenants Organization (NTO), a national organization of tenant associations, acts as a

national lobbyist for tenant activities and deals with the issues of rental charges for low-income tenants and the involvement of the federal government in providing adequate, affordable housing for poor people. NTO has been and is committed to the principle that low-income tenants be required to pay no more than 25%-30% of their adjusted income for rent. In view of this commitment it is very interested in the outcome of the instant cases because the operating subsidy program was enacted by Congress to insulate low-income tenants from uncontrollable and skyrocketing increases in property taxes and utilities.

People United to Save Humanity (PUSH) is a national organization formed to advance the rights of minorities and low-income people. In light of its commitment to the preservation of existing subsidized housing for low-income people, PUSH has created Operation PUSH with a national coordinator and housing director. Also, Operation PUSH in 1977 persuaded the Secretary of HUD to institute a national moratorium to prevent foreclosure of federally-assisted multifamily housing projects. Operation PUSH submitted to HUD over 100 remedies for curing mortgage loan defaults and emphasized the immediate need to implement existing Congressionally enacted subsidy programs for low-income tenants. PUSH believes the issue before this Court in the instant cases is critical if rents in federally-assisted housing are to be maintained at levels which poor people can afford and if projects are to be saved from default and foreclosure.

The National Conference of Catholic Charities is an association of several hundred Catholic charitable agencies located in 142 of the 153 Catholic dioceses in the United States. The Conference and its member

agencies have long been concerned with the dislocation of low-income persons, urban renewal, and other similar governmental programs such as the Section 236 program which is the subject of this case.[3]

The amici discussed above have a genuine interest in the implementation of the operating subsidy program designed by Congress to protect low-income tenants from paying exorbitant rents for ever increasing utilities and property taxes and to maintain the fiscal viability of these projects.

**Issues to Be Addressed in the Brief Amici Curiae.**

The issue raised in *Ross* and *Abrams* is whether the Secretary of the United States Department of Housing and Urban Development (hereinafter "HUD") has the discretion to refuse to implement the operating subsidy program, an integral part of the Section 236 federally subsidized housing program. Operating subsidies were designed by Congress to save the troubled Section 236 housing program by subsidizing increasing costs of property taxes and utilities, thereby keeping rents at a level which low-income tenants could afford and preventing project owners from being forced to default on their mortgages. The Secretary's failure to pay operating subsidies, in direct contravention of Congressional intent, is jeopardizing the fate of Section 236 projects across the country and is causing severe

[3]The Conference has appeared as an amicus in two cases challenging HUD's refusal to pay relocation benefits to eligible tenants pursuant to 42 U.S.C. §4601, *et seq. Moorer v. Department of Housing & Urban Dev.*, 417 F.Supp. 1261 (W.D. Mo. 1976), *aff'd.*, ..... F.2d ....., 46 U.S.L.W. 2155 (8th Cir. Sept. 9, 1977), and *Dawson v. U.S. Dept. of Housing & Urban Development*, 428 F.Supp. 328 (N.D. Ga. 1976), *appeal pending*, No. 77-1382 (5th Cir.).

hardship to hundreds of thousands of low-income tenants.

**Summary of Argument.**

Congress in 1974 enacted the operating subsidy provisions of 12 U.S.C. §1715z-1 to relieve tenants and project owners of Section 236 housing from the burden of skyrocketing costs of utilities and property taxes. The language of the statute and its legislative history make it plain that Congress mandated that this subsidy program be implemented. But the Secretary of HUD refused to pay these subsidies and has continued in her refusal despite reprimands from Congress and despite unanimous judicial rulings that her refusal was unlawful. Finally, in frustration, Congress took the extraordinary step of re-enacting the operating subsidy program in Pub. L. No. 95-128 to reconfirm its intent that the program be mandatory and to compel HUD to immediately pay operating subsidies on behalf of tenants.

Congress is the body entrusted under our Constitution with the authority to enact laws controlling the direction of this country's housing policy. Amici will demonstrate that the Secretary of HUD has, since the creation of the Section 236 program for low-income tenants, sought to thwart the will of Congress, and that Congress has continually rebuked the Secretary and has refused to sanction her attempts to usurp its lawful function.

The Secretary has attempted to justify her position with a variety of excuses, all of them without merit. Her claim that she would prefer another kind of subsidy program cannot justify her failure to comply with Congressional directives, and her plea that she has insufficient contract authority to allow her to implement

the program is unpersuasive. The Secretary can pay operating subsidies directly from the excess rental reserve fund without the use of contract authority. Therefore, that her Section 236 contract authority is limited and that she chooses to allocate that contract authority for other purposes are irrelevant. Even if the Secretary were required to use contract authority to pay operating subsidies, she has abused any discretion she might have by allocating none of her contract authority for that purpose. Instead, she has preferred to continue to construct new projects which are doomed to fail without the subsidies needed to save those projects from default, and to use a substantial portion of her contract authority for subsidies which Congress did not authorize. Operating subsidies would provide substantial benefits to tenants, and would not be difficult to administer. Consequently, the Secretary's failure to implement this subsidy program is unsupportable.

Because of the enactment of Pub. L. No. 95-128, this Court should now dismiss the petitions for review in these two cases as improvidently granted since these cases will now be of no precedential value and no longer present an issue of national housing policy which it is necessary for this Court to resolve.

## ARGUMENT.

### I.

### CONGRESS HAS BEEN STRUGGLING FOR YEARS TO PREVENT HUD FROM USURPING CONTROL OF SECTION 236 HOUSING POLICY.

Congress enacted the Section 236 program in 1968 "to assist families with incomes so low that they could not otherwise decently house themselves. . . ." 12 U.S.C. §1701t. Congress designed that program "[f]or the purpose of reducing rentals for lower income families." 12 U.S.C. §1715z-1(a). Under Section 236, which provides federal subsidies to private landlords to enable them to meet the housing needs of the poor, the Secretary of HUD is authorized to insure mortgages of multi-family housing projects and to make interest reduction subsidy payments to the project owners so that tenants' rents can be reduced accordingly. However, because HUD officials felt that the program was not operating well, in 1973 they suspended Section 236, along with several other housing programs.[4]

Congress' reaction to that suspension was a sharp and emphatic disapproval and a directive to reimplement Section 236. Thus began the running battle between Congress and HUD over which of them would control national housing policy. The Senate Reports which accompanied the 1974 HUD Appropriations Act[5] expressed the Appropriation Committee's dissatisfaction with the Secretary's suspension of Section 236.

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[4]The Secretary's limited discretion to suspend these programs, after a thorough study had shown they were unworkable in operation and unsalvageable, was upheld in *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

[5]Pub. L. No. 93-414, 88 Stat. 1095 (1974).

> . . . The Committee is distressed and deeply concerned by the Administration's action to abandon our nation's historic housing program.
>
> . . . .
>
> The Committee feels that the Administration has justified its actions for a variety of unsupported reasons. Among other things, it has claimed that the programs were not achieving the goals set by the Congress, but by no stretch of the imagination is that correct.
>
> . . . .
>
> The Sections 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather than from any inherent defects in the programs. In cities with good HUD management, such as Milwaukee, the program was a great success. In cities with rampant corruption among housing officials, it, along with other HUD programs, failed. But the failures in certain cities were not peculiar to Sections 235 and 236 and, in fact, these programs were not the main ones affected or which failed, contrary to the opinion of the Department and some judicial mistakes of fact.[6] The Department blamed the programs instead of its own mismanagement. As a consequence of this mismanagement, over 400 indictments have been handed down in housing fraud cases. S. Rep. No. 93-1091, 93rd Cong. 2d Sess. 6-7 (1974). The same statement is also found in

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[6]Presumably this reference to "judicial mistakes of fact" reflects disagreement with the Court's conclusions, in *Commonwealth of Pennsylvania v. Lynn, supra,* that the Section 236 program was unworkable in operation and unsalvageable even with modifications.

S. Rep. No. 93-1056, 93rd Cong. 2d Sess. 6-7 (1974).

Obviously, then, Congress disagreed with HUD's conclusion that the Section 236 program should be suspended, and to force its reimplementation Congress adopted the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974), which extended the life of the Section 236 program for two years.[7] At the same time, recognizing that there were deficiencies in the existing 236 program, Congress enacted the operating subsidy provisions of Section 236 in 12 U.S.C. §1715z-1(f)(3) and (g), providing subsidies to offset increases in costs of property taxes and utilities. Congress created these subsidies to alleviate the burden of excessive rents imposed on tenants.[8] In the 1974 amendments to Section 236, Congress also provided for "deep subsidies".[9] The purposes of both the deep subsidy and operating subsidy programs are similar —to reduce rents to qualified tenants and provide for an economic mix within each Section 236 project without threatening the solvency or effective management of these projects.[10]

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[7]Congress has continued to extend the Section 236 program, to September 30, 1977 in Section 4(a) of Pub. L. No. 94-375, 90 Stat. 1067 (1976), and to September 30, 1978 in Section 301(e) of Pub. L. No. 95-128 (1977).

[8]S. Rep. No. 93-693, 93rd Cong. 2d Sess. (1974); rptd. at 3 U.S. Code, Cong. & Admin. News 4273 (1974).

[9]Pub. L. No. 93-383, 88 Stat. 633 (1974), 12 U.S.C. §1715z-1(f)(2).

[10]The Senate Report accompanying the Housing and Community Development Act of 1974 and introducing these changes to the Section 236 program noted that:

> This program appears as Section 502 of the proposed Act and grows out of the existing rental housing as-

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The Secretary responded to the passage of the Housing and Community Development Act of 1974 by continuing the Section 236 interest reduction program,[11] but adamantly refused to implement the operating subsidy program. The Secretary has persisted in this refusal despite repeated Congressional reprimands. A strong expression of Congressional disapproval of the Secretary of HUD's handling of the Section 236 program came in 1974 when the Senate Committee on Appropriations imposed financial sanctions on HUD.

> The Committee has concurred with the House in making significant cuts in several of the Department's salary and expense accounts. The Committee believes that too often departmental personnel have been used to obstruct rather than carry out directives of the Congress. Examples are the refusal to fully implement the Section 202 program for the elderly, the inability to come up with regulations for the Section 802 State Housing Finance and Development Agency Program, the failure to deliver the housing goals report on schedule,

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sistance program (section 236 of the National Housing Act). However, while it retains features of existing law, it also contains numerous improvements in that law so as to be, in many ways, a new program rather than a simple continuation of the old. It is believed that these changes—including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their control—will help eliminate a variety of problems and permit the program to operate more effectively in the future. S. Rep. No. 93-693, 93rd Cong. 2d Sess. (1974); rptd. at 3 U.S. Code, Cong. & Admin. News 4273, 4302 (1974).

[11]However, her efforts on behalf of that program were so minimal that Congress felt compelled to withhold from the Secretary funds for another housing program which she preferred until she used her remaining Section 236 contract authority. H. Rep. No. 93-1139, 93rd Cong. 2d Sess. 7 (1974).

> *the refusal to attempt to meet the housing goals, and the continuing effort to kill the Sections 235 and 236 programs.* S. Rep. No. 94-326, 94th Cong. 1st Sess. 11-12 (1975). (Emphasis added.)

Two years later, HUD and Congress were still at odds, and the Senate Committee on Banking, Housing and Urban Affairs reaffirmed Congressional intent that the Secretary pay operating subsidies.

> The reserve [fund] is required under Section 236 (g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented this provision of the 1974 Act. S. Rep. No. 94-749, 94th Cong. 2d Sess. 10 (1976).

Still the Secretary did nothing and Congressional discontent flared up again. Senator Sparkman expressed his outrage at HUD's recalcitrance.

> HUD has failed to carry out [the operating subsidy program] despite the specific legislative authority conferred 2 years ago, despite the fact that almost $25 million in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision.
>
> . . . .
>
> Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 236(g).

122 Cong. Rec. S 10775 (daily ed. June 26, 1976).

At this point Congressional intent to mandate payment of operating subsidies seems clear, and every Court to consider the issue had found the program to be mandatory. The federal judiciary had unanimously and repeatedly ordered the Secretary to pay operating subsidies on behalf of tenants in Section 236 housing.[12]

Even in the face of this unanimous judicial command, HUD continued to refuse to implement the operating subsidy program, and Congress recognized that HUD, despite repeated admonitions from Congress and the courts, would continue to unjustifiably refuse to pay operating subsidies. Congress therefore began debate on new bills, and proposed amendments to them, which would again re-enact the operating subsidy program. That debate reflects the serious distress of the Section

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[12]*See Ross v. Community Services, Inc.*, 396 F.Supp. 278 (D. Md. 1975), 405 F.Supp. 831 (D. Md. 1975), *aff'd.*, mem. 544 F.2d 514 (4th Cir. 1976); *Dubose v. Hills*, 405 F.Supp. 1277 (D. Conn. 1975), 420 F.Supp. 399 (D. Conn. 1976), 434 F.Supp. 227 (D. Conn. 1977), *appeal pending*, Nos. 76-6107 and 76-6181 (2nd Cir.); *Harrison v. Hills*, CV No. 74-938 (W.D. Pa. 1975); *Campbell v. United States Dep't of Housing & Urban Development*, CV No. 75-471 (N.D. Ohio 1975); *Abrams v. Hills*, 415 F.Supp. 550 (C.D. Cal. 1975), *aff'd*, 547 F.2d 1062 (9th Cir. 1976); *Parker Square Tenants Ass'n v. The Dep't of Housing & Urban Development*, CV No. 75CV577-W-3 (W.D. Mo. 1976); *Carberry v. Hills*, CV No. 76-521-F (D. Mass. 1976); *Gertsch v. Hills*, 414 F.Supp. 15 (D. Utah 1976); *Sicuro v. Hills*, 415 F.Supp. 553 (C.D. Cal. 1976), *appeal pending*, No. 76-2872 (9th Cir.); *Battles Farm v. Hills*, 414 F.Supp. 521 (D.D.C. 1976), *appeal pending*, No. 76-1641 (D.C. Cir.); *Underwood v. Hills*, 414 F. Supp. 526 (D.D.C. 1976), *appeal pending*, Nos. 76-1603 and 76-1650 (D.C. Cir.). *See also Dussault v. Hills*, CV No. 76-147 (D.N.H., May 23, 1976); *Gibson v. Harris*, No. 77-0488-R (E.D. Va., Sept. 30, 1977); *Haas v. Harris*, No. 77-0235 (D.R.I., Aug. 11, 1977); *Lefort v. Hills*, No. 76-0286 (D.R.I., Nov. 19, 1976).

236 program caused by HUD's recalcitrance.[13] For example, Representative Hanley highlighted the default rate in Section 236 projects:[14]

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[13]One of a number of bills which was considered was S. 565, introduced by Senator Pearson to "require the payment of operating subsidies." 123 Cong. Rec. S 2054 (daily ed. Feb. 2, 1977). In introducing his bill Senator Pearson described the history to date of Congress' battle with HUD over the operating subsidy program.

> Mr. President, in 1974 the Congress amended the National Housing Act with the intention of securing the long term housing needs of families and elderly in lower-income brackets. A substantial expression of that intention was contained in amendments providing that operating subsidies for section 236 housing projects be made for rent increases resulting from rising utility and tax rates. It is now 1977, and operating subsidies have yet to be paid. And so, Mr. President, I am today offering an amendment that simply seeks to assure that express congressional intention in this area is no longer thwarted.
>
> Mr. President, the Banking, Housing and Urban Affairs Committee was concerned, during consideration of the 1974 amendments, that rapidly rising utility and tax costs might endanger the success of Federal housing projects. The committee rightly feared that after an initial operating expense level was established and rent subsidies set, that there would be no mechanism to adjust the subsidies to meet these rising costs.
>
> The increases would become an evergrowing burden for the tenants, who would then be required, in direct contradiction of the program's goals, to pay much more than 25 percent of their incomes for rent. To avoid this problem the committee proposed, and Congress passed, a provision that authorized the Secretary of the Department of Housing and Urban Development to pay subsidies for those rent increases justified by increased utility and tax rates. But the Department has not authorized such payments except in those instances when tenants have resorted to the courts. *Id.*

[14]Mr. Hanley's figures on the alarming rate of default on Section 236 mortgages confirm earlier findings in HUD's own studies. In 1973, HUD projected that 20% of all Section 236 projects would fail in their first ten years. *Housing In the Seventies,* an October 6, 1973 publication by the Secretary of Housing and Urban Development, at 4-20 and 4-57. A

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> . . . [D]oes anyone know how much we were in the bag for as of September 1976, with the 236 program? We had at that time better than 50,000 units in default, accounting for almost $900 million, in part because HUD has failed to exercise its authority in this matter.
>
> . . . .
>
> Incidentally, this is another interesting factor, HUD this year asked for an increase in its risk insurance up to $1.8 billion. Obviously the antenna is up and it anticipates that we are going to continue to have this kind of default.
>
> . . . .
>
> . . . [A]lready better than 4,000 units have had to be sold at a loss of about $49 million approximately. 123 Cong. Rec. H 4286-87 (daily ed. May 11, 1977).

Senator Brooke also addressed the default rate in Section 236 projects.

> I chaired hearings in Boston on April 18 of this year to hear testimony on the serious problems in HUD-assisted multi-family housing built under the section 221 and section 236 programs.
>
> In Boston alone, there are currently 115 projects built under these two housing programs.
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> . . . .
>
> HUD has already foreclosed or assumed ownership of about 47 of these developments, with over

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1975 HUD study found that foreclosure and sale of subsidized projects were steadily increasing. Between fiscal years 1968 and 1973, 10 projects were sold, in 1974-1975, 77 projects were sold, and for 1976, 609 projects were either in the process of being foreclosed upon or were estimated by HUD to be on the brink of foreclosure. "Multi-family Property Disposition," A Staff Study by the United States Department of Housing and Urban Development, October, 1975, at 1.

> 3,400 housing units. As many as 7,000 tenants in Boston may be faced with substantial rent increases beyond their ability to pay, or be forced to move out of their homes. 123 Cong. Rec. S 9043 (daily ed. June 7, 1977).

And Senator Chafee emphasized the problem of increasing rents in those Section 236 programs which were not being foreclosed on.[15]

> . . . When Congress set this up, Mr. President, it was intended that those tenants in the 236 housing would pay 25 to 30 percent of their adjusted monthly income for rent.
>
> . . . .
>
> What has happened over the past several years is that there have been such increases in local real estate taxes and in energy costs, primarily the cost of fuel oil, that HUD has had to approve rather substantial increases in the rents paid by the tenants in order for the owner of the project to break even.
>
> For example, in my State of Rhode Island, and I suspect this is true elsewhere, some 70 percent of the tenants are paying over 30 percent of their after tax income for rents. 123 Cong. Rec. S 9042 (daily ed. June 7, 1977).

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[15]Again, HUD's own studies show that rental rates are escalating in Section 236 projects. A HUD investigation of a sample of 522 Section 236 projects showed that 81% of the tenants had been paying more than 25% of their incomes for rent. In projects visited in New York and Atlanta, 18% and 20%, respectively, of the tenants in those projects had been paying at least 75% of their incomes for rent. "Section 8 Housing Assistance Payments Programs: The Loan Management Set-Aside," A Field Study by the Department of Housing and Urban Development, January, 1977, at 28 and 37.

Senator Cranston elaborated:

> HUD's failure to implement the section 236 operating subsidy program is jeopardizing the financial stability of the owners of 236 housing and the future tenancy of approximately 232,000 lower-income tenants of these projects who are entitled to these benefits. Without the benefit of the subsidy, many section 236 owners are unable to meet rapidly increasing operating expenses which are beyond their control, and are placed in dire financial straits . . . and the future tenants, on the other hand, are faced with the choice of either vacating the housing or paying rents that far exceed 25 to 30 percent of their income by cutting back on food, medical care, clothing and other necessities of life. It has been reported to me that in California there are section 236 tenants who pay upwards of 90 percent of their income for rent.[16] 123 Cong. Rec. S 9045 (daily ed. June 7, 1977).

Senator Humphrey summarized the plight of tenants and landlords of Section 236 projects as a result of HUD's failure to pay operating subsidies:

> . . . [O]ver these recent years, families have had to devote larger and larger proportions of their family income to basic shelter costs. At some of these projects families are spending 35, 40, and 50 percent of their monthly disposable income for rent. Even these amounts, these rents, in project after project, have become inadequate not only

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[16]Senator Kennedy expressed agreement: "We know that many tenants in section 236 projects are paying as much as 90 percent of their adjusted income for rents. These tenants desperately need help." 123 Cong. Rec. S. 9046 (daily ed. June 7, 1977).

> for making mortgage payments, but for assuring proper maintenance. We are thus confronted by a situation in which rents are rising inexorably at the same time that services necessarily are declining. Project after project constructed only recently and with the aid of our section 236 program, are slipping into slums. 123 Cong. Rec. S 9045 (daily ed. June 7, 1977).

The debates also show that Congress had intended from the beginning that the operating subsidy program be mandatory and that it be implemented, and resented being required to re-enacted legislation in order to compel the Secretary to pay operating subsidies.

> In 1974, the Congress responded to the growing problems by adopting an operating subsidy for 236 projects. . . .
>
> And after we had done this, we were faced with intransigence by the administration—a stolid and unaccountable refusal to use the program. The result was default after default. . . .
>
> . . . But the problem remains that despite the losses in court, HUD has still not implemented the program. It is time we got some action from HUD with this program. Remarks of Senator Humphrey, 123 Cong. Rec. S 9045-46 (daily ed. June 7, 1977).

Senator Pell continued in the same vein:[17]

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[17]*See also* the statements of Senator Chafee: "The act presently provides that they should do it, and HUD has refused to do it", and the remarks of Senator Cranston: "Congress in 1974 enacted the Section 236 operating subsidy provision. . . . Despite compelling indications that Congress intended that the operating subsidy program be implemented, the former Secretary of HUD refused to pay such subsidies except when required to so do by court order." 123 Cong. Rec. S 9042, 9045 (daily ed. June 7, 1977).

> I believe the time has come for the Senate to reconfirm its intent that HUD activate this program.
>
> Mr. President, when Congress passed the operating subsidy program in 1974 it was clear that HUD was mandated to provide operating subsidy funds for Section 236 housing projects experiencing substantial cost escalations. . . . I believe this amendment should clear the air at long last concerning the intent of Congress on this issue. 123 Cong. Rec. S 9046 (daily ed. June 7, 1977).[18]

The bills passed by the House and Senate were submitted to a Conference Committee for reconciliation and on September 26, 1977 the Conferees reported out H.R. 6655, which amended the language of Section 236 [12 U.S.C. §1715z-1(f)(3)] from "the Secretary is authorized to make, and contract to make, additional assistance payments. . . ." to "The Secretary is authorized to make, and *shall* contract to make. . . ." 123 Cong. Rec. H 10103 (daily ed. Sept. 26, 1977). (Emphasis added).

These amendments were the culmination of Congressional efforts to force the Secretary to implement the program it had mandated three years before, and they make it indisputable that operating subsidies are man-

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[18]The Representatives and Senators who made the quoted statements were well informed about the intent of Congress in passing the operating subsidy provisions of the Housing and Community Development Act of 1974. Three of the Senators —Proxmire, Cranston, and Brooke—were conferees for the 1974 Act and one was the ranking member of the 1974 Senate Subcommittee on Housing and Urban Affairs. That their views are entitled to great weight is without question. *See United States v. United Mine Workers of America,* 330 U.S. 258, 281 (1947).

datory. The Conferees stated that they intended by these amendments to "direct the Secretary to make additional Section 236 operating subsidy payments." 123 Cong. Rec. H 10114 (daily ed. Sept. 26, 1977). The bill was signed into law by President Carter on October 12, 1977, as Pub. L. No. 95-128.

As this history demonstrates, Congress has repeatedly demanded that operating subsidies be paid and it is therefore the duty of the executive branch to comply.[19] It is fundamental that only the Congress has the power to make laws. ". . . The Constitution [does] not subject [the] lawmaking power of Congress to presidential . . . supervision or control. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone. . . ." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 588-89 (1952). And once Congress has enacted a law the executive branch has no constitutional authority to refuse to execute it. "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution and entirely inadmissible." *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 522, 611 (1838).

The Secretary's refusal to pay operating subsidies is, in effect, an executive branch veto of a statute duly enacted by the Congress and signed into law by the President. It is completely inappropriate under our system of government that this kind of back-handed executive veto take place. Article I, Section VII of

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[19]"[Our Constitution] does most clearly . . . state that laws, good or bad, be enacted by the congress and enforced by the President." *Guadamuz v. Ash,* 368 F.Supp. 1233, 1243 (D.D.C. 1973).

the Constitution of the United States provides that following passage of a bill by both Houses of Congress, it shall be presented to the President. If the President approves it he shall sign it, but if not he shall return it to the Congress, with his objections. There is no other constitutional mechanism by which an executive veto can occur. *People ex rel. Bakalis v. Weinberger,* 368 F.Supp. 721, 726 (N.D. Ill. 1973).

It is no longer possible for the Secretary of HUD to argue that Congress granted her discretion to refuse to implement the operating subsidy program. The Congress intended that this program be mandatory when it first enacted the statute and has tried repeatedly over the years to compel HUD to comply with its directives. It is time for this Court to come to the aid of Congress and refuse to allow the Secretary of HUD to continue to thwart the will of Congress and deny to low-income tenants and project owners the operating subsidies which they so desperately need.

## II.

## THE SECRETARY OF HUD'S REFUSAL TO PAY OPERATING SUBSIDIES IS UNJUSTIFIABLE.

### A. The Secretary's Initial Excuses Are Unsound.

In support of her refusal to implement the operating subsidy program, the Secretary initially relied primarily on two arguments set forth in affidavits filed with the Courts below, J.A. 32-48 and 156-162. She asserted first that she could not pay operating subsidies because she needed additional contract authority in order to spend the excess rental reserve fund. Second, she said that she chose not to pay those subsidies because she believed that they were inequitable since they only assisted Section 236 projects.

**1. The Reserve Fund Is Immediately Available and Must Be Used to Pay Operating Subsidies.**

Section 236 provides that the excess rental reserve fund is "to be used by the Secretary to make" operating subsidy payments. 12 U.S.C. §1715z-1(g). However, the Secretary has persistently argued that direct payments cannot be made from the reserve fund but that the fund can be used only to liquidate contracts. This argument has been rejected by every court to consider it[20] for the many reasons set forth in the brief of respondent low-income tenants. The Secretary's persistence in arguing that she is powerless to spend the reserve fund without contract authority is symptomatic of her adamant refusal to carry out the will of the legislature. The federal judiciary has unanimously rejected the Secretary's contention and the judgments of these courts have been validated by Congress. Congress never intended the use of the reserve fund to be so limited and HUD's recalcitrance has forced Congress to recently reiterate its position. The Committee of Conference,[21] reporting out the Housing and

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[20]*See, e.g., Dubose v. Hills, supra,* 405 F.Supp., at 1288-1292; 420 F.Supp. at 401-402; *Ross v. Community Services, Inc.,* 396 F.Supp. at 287; 405 F.Supp., at 835-836, *aff'd mem.,* 544 F.2d 514 (4th Cir. 1976) (per curiam); *Underwood v. Hills, supra,* 414 F.Supp., at 531; *Battles Farm Co. v. Hills, supra,* 414 F.Supp., at 526; *Abrams v. Hills, supra,* 415 F.Supp. at 553, *aff'd, supra,* 547 F.2d, at 1068-1069, 1071.

[21]Resort to legislative history to determine Congressional intent is appropriate even if a statute, such as Pub.L.No. 95-128, is clear on its face:

> [W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination".
>
> *United States v. American Trucking Assns.,* 310 U.S. 534, 543-44 (1940) (footnotes omitted), *quoted with approval in Train v. Colorado Public Interest Research Group. Inc.,* 426 U.S. 1, 96 S.Ct. 1938, 1942 (1976).

Community Development Act of 1977, Pub. L. No. 95-128, which *inter alia* re-enacted the mandatory operating subsidy program, stated:

> The conferees are further aware that HUD has asserted in litigation that it does not have sufficient contract authority to make such payments to the full extent of monies in the reserve fund. These amendments are intended to clarify that while the Secretary is authorized to enter into contracts with project owners to make such payments, *no contract authority is needed to spend the reserve funds for operating subsidies.* 123 Cong. Rec. H 10114 (daily ed. Sept. 26, 1977). (Emphasis added.)[22]

The Secretary claims that because the amount in the reserve fund is limited and will fluctuate, Congress could not have intended that fund to be used to implement the operating subsidy program. Petitioners' Brief, at 15-16. But the Secretary is simply wrong about that. The recent amendments to the Section 236 program in Pub. L. No. 95-128 make it indisputable that Congress has required that the reserve fund be

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[22]Pub. L. No. 94-378, 90 Stat. 1095 (1976), does not support the Secretary's contention that the reserve fund must be used to liquidate contracts. Petitioners' Brief, at 17, *et seq.* That statute did not specify that the fund could only be so used. Congress simply made any excess monies in the reserve fund, after operating subsidies had been paid, available to liquidate contracts for a number of additional housing programs. *See Dubose v. Hills, supra,* 420 F.Supp. 399, 403 (D. Conn. 1976); *Abrams v. Hills, supra,* 547 F.2d 1062, 1071-72 (9th Cir. 1976). In any event, any support for the Secretary's claim that she might once have derived from Pub. L. No. 94-378 has been eliminated by the Committee of Conference's explicit statement quoted above that contract authority is not needed to spend the reserve fund for operating subsidies.

spent for operating subsidies.[23] And, in fact, the reserve fund contains enough money to pay operating subsidies nationwide for at least an entire year. The Secretary admits that in December of 1976 she had $54.4 million in that fund and that it is increasing at the rate of $12 million a year Petitioners' Brief, at 14 n. 15. The accumulation since December would approximately offset the $18 million claim which the Secretary *alleges* exists against that fund. The remaining sum is more than sufficient to pay subsidies nationwide for a full year, since the Secretary estimates that that would require only $43 million. Petitioners' Brief, at 12 n. 13. Moreover, the amendments specifically contemplate that Congress will make future appropriations to provide additional funding for the operating subsidy program, since Congress amended Section 236(f)(3) to require that the Secretary make operating subsidy payments "to the extent of the moneys in the reserve fund established under subsection (g) and to the further extent of funds authorized in appropriation Acts. . . ." Pub. L. No. 95-128, Section 206(a).

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[23]Senator Kennedy noted that spending the reserve fund for operating subsidies would provide "a short term partial solution" to the problems facing HUD's subsidized housing programs. 123 Cong. Rec. S 9046 (daily ed. June 7, 1977). Senator Cranston explained further: "HUD admits that there is money available in the reserve fund to make additional assistance payments [operating subsidies] to all section 236 projects nationwide for at least a year . . . While I recognize that Congress and HUD will be working on a long-term and expanded solution to this problem, including the problems of 221(d)(3) projects, certainly relief should be made available to these [section 236] tenants while this process is going on since funds are available specifically for that purpose." 123 Cong. Rec. S 9045 (daily ed. June 7, 1977).

The Secretary's continuing claim that the insufficiency of the reserve fund indicates that Congress did not require the fund to be spent for operating subsidies is further undermined by the fact that the Secretary has taken at least two steps to deplete the fund. First, the Secretary has altered the method by which the excess rentals which make up the fund are collected from Section 236 project owners. On June 6, 1975, a mere two weeks after the Secretary was first ordered to pay operating subsidies in *Ross, supra,* 396 F.Supp. 278, HUD promulgated Transmittal No. 24, which changed the method by which Section 236 project owners are to compute excess rentals to be remitted to the Secretary for deposit into the reserve fund in a manner that diminishes the amount of those contributions. On January 15, 1976, HUD's General Counsel issued an opinion concluding that Transmittal No. 24 should be implemented retroactively to 1968, which HUD estimates would result in the refund of $18 million from the reserve fund to Section 236 project owners.[24]

Second, the Comptroller General of the United States has recently reported to the Congress that HUD is not requiring sufficient contributions into the reserve fund and that HUD had made little progress in collecting the correct rental charges from low-income tenants since HUD was informed of this problem in 1973. The Report concludes that:

> Numerous weaknesses still exist in the way Section 236 project owners carry out their income recertifications. Also, HUD has not effectively moni-

[24]This opinion was issued one month after the initial preliminary injunctions requiring payment of operating subsidies were issued in *Dubose v. Hills,* 405 F.Supp. 1277 (D. Conn. 1975).

> tored income recertifications at projects to insure that they are carried out in conformance with HUD requirements and in a manner which insures that proper rents are charged tenants in the projects and excess rents are remitted to the Federal Government.[25]

These actions and inactions by the Secretary reducing the size of the reserve fund contravene the purposes[26] of the Section 236 program and directly harm low-income tenants.

**2. HUD's Policy Distaste for the Operating Subsidy Program Is Irrelevant.**

The other reason the Secretary initially gave for refusing to implement the operating subsidy program was that it would only alleviate the problems facing Section 236 projects and, because it did not resolve the difficulties of other subsidized housing programs, she preferred a broader approach to the economic problems affecting subsidized housing. J.A. 43-48. The Secretary, by advancing such an argument, has once again evidenced her intention to usurp Congress' constitutional

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[25]The Report is entitled "Little Accomplishment in Insuring that Proper Rents Are Charged Under the Section 236 Rental Assistance Housing Program." CED-76-146, October 15, 1976, Government Accounting Office, at 16. *See also* 12 U.S.C. §1715z-1(e) and 24 C.F.R. §425.25.

[26]In his Report the Comptroller General also found that many tenants paid less rent than HUD should have required and accordingly that fewer excess rental charges were sent to the Secretary by the project owners. It should also be noted that in September, 1975, HUD promulgated a new regulation raising the income limits for tenants of Section 236 projects as "its solution" to the sharp increase in operating costs. *See* 24 C.F.R. §236.72, 40 Fed. Reg. 52844-45 (1975), cited in *Dubose, supra,* 405 F.Supp., at 1288 n. 52. This "solution" is directly contrary to the purpose of Section 236—to provide decent housing at reduced rentals for low-income families.

authority to determine the course and direction of our nation's housing programs for lower-income families, and to substitute executive power for that of the legislative branch.[27]

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[27]This attempt to substitute HUD's judgment for that of Congress is reflected in the Affidavit of H. R. Crawford, the former Assistant Secretary for Housing Management at HUD, filed below, in which he recites HUD's policy arguments that implementation of the program passed by Congress would be "inequitable" in an attempt to justify HUD's refusal to pay operating subsidies.

. . . .

3. The operating subsidy provisions of Section 212 of the Housing and Community Development Act of 1974 is an attempt by Congress to address the problem of increased operating costs in Section 236 projects by providing additional subsidies to the project owner. However, Section 212 does not authorize additional assistance for HUD assisted multi-family projects insured under other sections of the National Housing Act which face identical problems.

4. Section 212 of the Housing and Community Development Act of 1974 authorizes the payment of operating subsidies to Section 236 project owners only to the extent necessary to maintain the basic rental charges for tenants at levels not in excess of 30 percent of their gross income. Therefore, the benefit of operating subsidies flows only to those Section 236 projects which are occupied by tenants whose basic rental charge exceeds 30 percent of their gross income. There are Section 236 projects in which a majority or all of the tenants occupying its units pay a rental charge which does not exceed 30 percent of their gross income. Consequently, the payment of operating subsidies will have little or no ameliorating effect upon the economic difficulties threatening the owners of a number of Section 236 projects.

5. The payment of operating subsidies solely to Section 236 project owners, therefore, is inequitable in providing relief only to a small proportion of HUD assisted multifamily projects and to an even smaller group of beneficiaries—those owners of Section 236 projects whose tenants have a basic rental charge exceeding 30 percent of gross income. In view of the need for a general multifamily default policy which will address itself to the economic difficulties facing owners and tenants of all HUD

The Secretary should not be allowed to let her policy distaste for the operating subsidy program interfere with her constitutional duty to execute the laws enacted by Congress. If an administrative agency ever has the discretion to refuse to carry out a congressionally enacted program, it is only when the program has been found by careful study, in operation, to be counterproductive and impossible to modify and administer in a way which would fulfill the intent of Congress in enacting that program. *See Commonwealth of Pennsylvania v. Lynn, supra.*[28] In enacting the operating subsidy program Congress intended to assist tenants and projects owners of Section 236 housing, and that is precisely what the program would do if implemented. Payment of operating subsidies would, consistent with Congressional intent, prevent uncontrollable increased operating costs from being passed on

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assisted multifamily projects, the Department is currently considering a number of alternative proposals for solutions that are more comprehensive and more equitable. J.A. 157-158.

[28]In *Lynn,* the Court sustained only the Secretary's "narrow" discretion, 501 F.2d at 862, to suspend housing programs where those "programs have come into conflict with the overall housing policy or the program goals set by Congress, and . . . administrative correctives within [the Secretary's] power to take have not [and] will not resolve the conflict. . . ." 501 F.2d, at 856. At the same time, the Court recognized that the Secretary has no discretion to ignore a duly enacted and funded program "for reasons of policy . . . extrinsic to [its] operation. . . ." 501 F.2d, at 852. The Court upheld the Secretary's suspension of the Section 236 program after the Secretary demonstrated that the program as it was then operated did not benefit, but in fact may have actually harmed, the low-income people Congress had intended to aid by that program. But the discretion recognized in *Lynn* in no way justifies the Secretary's failure to implement the operating subsidy program which would accomplish exactly what Congress intended—to subsidize increasing costs of property taxes and utilities for tenants paying more than 25%-30% of their incomes for rent. It was one thing for the Secretary to stop making commitments to build new housing

(This footnote is continued on next page)

to low-income tenants.[29] Thus the program must be implemented, and the Secretary's dislike of it is irrelevant.

## B. The Secretary's Subsequent Excuses Are Also Unpersuasive.

In addition to the two initial reasons which the Secretary gave for her refusal to pay operating subsidies, her counsel have subsequently offered a variety of additional justifications.

### 1. The Language of the Operating Subsidy Provisions Is Mandatory.

The Secretary has sought to justify her resistance to her mandatory duty to pay operating subsidies by contending that the difference in authorizing language for the deep subsidy and operating subsidy programs indicates that, while the deep subsidy provisions are mandatory, the operating subsidy provisions are discretionary.

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projects that comprehensive studies showed would be doomed to failure. It is quite another to refuse to implement a program that Congress has determined is necessary to save existing housing projects in which vast investments of private and public money have already been made. While the Secretary may discontinue a program which in operation has proven to be counterproductive, she may not refuse to implement an as yet untried program because that refusal can only be based on policy reasons unrelated to problems with the program in operation.

[29]As the District Court concluded in its opinion in *Dubose v. Hills, supra,* one of the earliest, most comprehensive, and well reasoned operating subsidy decisions:

> Congress adopted the "operating subsidy" provisions in response to the serious problem of operating cost increases due to sharp rises in oil prices and local property taxes. The program was designed to assist only "deserving" projects, and their low income residents. HUD cannot now refuse to fund or implement the "operating subsidy" provisions because they only solve the particular problem

The Secretary's contention turns solely upon the difference between the phrase "shall make, and contract to make" in the former's provisions and the phrase "authorized to make, and contract to make" in the operating subsidy provisions. 12 U.S.C. §§1715z-1(f)(2) and (f)(3). However, the language of both provisions is mandatory and the Secretary's focus solely on the words "shall" and "authorized"[30] is too narrow.

> . . . [D]iscerning Congress's intent to bestow or withhold discretion to suspend the programs in their entirety is not a simple matter of tallying the "shalls" and "mays" and finding that the "mays" have it. *Commonwealth of Pennsylvania v. Lynn, supra,* 501 F.2d, at 854.

Even if it were appropriate to tally mays and shalls, the operating subsidy provisions would be mandatory because they direct the Secretary through the use of the word "shall" to take a number of steps prior to actual payment of operating subsidies, steps which serve no purpose unless operating subsidies are paid.[31]

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for which they were designed, or because they only help the particular population for which they were enacted. The "operating subsidy" program does not have a counter-productive impact on our national housing policy merely because it does not solve all the present problems facing HUD's multi-family assistance programs. Surely Congress has the power to solve a specific problem with which it is familiar without running the risk of administrative non-enforcement because it has not gone far enough, or not gone in the direction considered desirable by the administrative branch. 405 F.Supp., at 1290-91. (Footnote omitted.)

[30]Even the word "unauthorized" has been determined to be the language of command. *Sioux Valley Empire Electric Ass'n, Inc. v. Butz,* 367 F.Supp. 686 (D.S.D. 1973), *aff'd,* 504 F.2d 168 (8th Cir. 1974).

[31]Congress created mandatory prerequisites to the payment of operating subsidies—including the establishment of the reserve fund and the setting by the Secretary of initial operating expense levels for Section 236 projects. Compliance with both of these

(This footnote is continued on next page)

Rather than counting the shalls and mays, the appropriate approach is to examine the entire statute, its purposes, and its legislative history in order to determine the intent of Congress.[32] It seems irrefutable, given the legislative history set forth in Part I of this Brief, that Congress intended to compel the Secretary to pay operating subsidies, and ". . . the overall thrust of [the] statute is not optional." *Dubose v. Hills, supra,* 405 F.Supp., at 1283.

There are good reasons why Congress used different language in the deep subsidy and operating subsidy provisions of Section 236. The difference reflects the fact there are no determinations for the Secretary to make prior to the payment of deep subsidies. Since deep subsidies are to be paid to 20% of the tenants in all newly constructed Section 236 projects, Congress simply said that the Secretary "shall" make these payments. On the other hand, before operating subsidies can be paid the Secretary must make initial determinations on eligibility (*e.g.*, set initial operating expense levels and determine whether costs of taxes and utilities

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prerequisites is required by the plain language of Section 236. "For each project there *shall* be established an initial operating expense level. . . ." 12 U.S.C. §1715z-1(f)(3). (Emphasis added). "The project owner *shall,* as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges *shall* be credited to a reserve fund to be used by the Secretary to make additional assistance payments . . . ." 12 U.S.C. §1715z-1(g). (Emphasis added).

[32]This Court has recently held that "[i]n expounding a statute we must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and its object and policy. . . ." *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975) (citations omitted). The Secretary's statutory authority under Section 236 cannot therefore include the power to defeat the overall purposes of the Section 236 program or its operating subsidy provisions.

have increased above those levels) and must exercise her judgment to determine whether the increases in utilities and property taxes are reasonable and comparable,[33] *i.e.*, whether the increased costs are due to poor management.

> While anxious to deal with [the problem of increased costs], the Committee also of course desired to develop a provision which would focus upon the real problem cases, and could be tightly administered, and would not simply reward poor management. . . . S. Rep. No. 93-693, 93rd Cong. 2d Sess. (1974); rptd. at 3 U.S. Code, Cong. & Admin. News 4273, 4303 (1974).

Thus, Congress directed the Secretary to make the necessary initial determinations and then authorized her to pay operating subsidies only to those projects which she had found met the statutory criteria. Both the operating and deep subsidy programs are mandatory in nature, but Congress has, in the statutory provisions, vested narrow discretion in the Secretary to determine which tenants and project owners are qualified to receive the very substantial benefits which operating subsidies would provide. The difference in language between the two provisions is, therefore, without significance. Both are equally mandatory.

**2. The Secretary Cannot Lawfully Refuse to Allocate Any Contract Authority for Operating Subsidies.**

The Secretary has also made a series of arguments which are premised on her assertion that she can only

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[33]Additional assistance payments shall be made only if the Secretary finds that the increase in the cost of utilities or local property taxes is reasonable and is comparable to cost increases affecting other rental projects in the community. 12 U.S.C. §1715z-1(f)(3).

pay operating subsidies through the use of contract authority and that her contract authority would be better used for other purposes. She argues that she has only a limited amount of contract authority and that Congress would prefer her to use it for the production subsidy (the interest reduction program) and for deep subsidies. Assuming for the purpose of argument that the Secretary can only make operating subsidy payments by using contract authority, her allocation of all contract authority to those other programs and none to operating subsidies is unsupportable and contrary to Congressional intent.

The Secretary claims that her decision to prefer the production subsidy is reasonable. Yet, a previous Secretary of HUD decided, after an exhaustive study, that the production subsidy program was counterproductive in operation and the United States Court of Appeals for the District of Columbia Circuit found that Congress had concurred in that decision. *Commonwealth of Pennsylvania v. Lynn, supra.* It defies reason to assert that the Secretary is rationally using her discretion to allocate limited contract authority when she allocates the bulk of it to the interest reduction program, which has been found defective and unworkable,[34] and none of it to the operating subsidy program, which Congress designed to improve and salvage the interest reduction program.

The Secretary attempts to justify her decision to use contract authority for the production subsidy by attributing to Congress a preference, which in fact

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[34]Given the default rates shown by HUD's own studies cited in footnote 14 *supra,* it is incredible that HUD should contend it is reasonable to continue to prefer to construct new projects which are doomed to fail rather than to subsidize and save existing projects.

is nonexistent, for building new projects. The Secretary cannot twist Congressional reprimands of HUD for its failure to use Section 236 contract authority promptly and Congressional directions to meet the housing needs of low income people, such as those contained in S. Rep. Nos. 93-1139, 93rd Cong. 2d Sess. (1974) and 93-1255, 93rd Cong. 2d Sess. (1974), into a mandate to emphasize housing production and ignore operating subsidies. The housing needs of poor people are not met by the production of new housing projects which are destined for ultimate failure and which those people cannot afford because rents are excessive due to escalating, unsubsidized operating costs.

The irrationality of the Secretary's position is underscored by the Congressional debates which preceded the recent re-enactment of the operating subsidy program. Representative Badillo said:

> It makes no sense for us to provide for additional construction if we are going to stand by and find that project after project throughout the States ends up in financial difficulty. . . . 123 Cong. Rec. H 4287 (daily ed. May 11, 1977).

Representative Hanley expressed agreement:

> Is it not a little ridiculous to let projects deteriorate, let them become unfit for occupancy and at the same time go out and construct brand new units of housing.
>
> . . . Again, I think it is utter nonsense if we spend a dollar in the way of new construction while on the other hand we let existing projects, where the capital investment is already made, bite the dust. That does not make sense at all. 123 Cong. Rec. H 4286-87 (daily ed. May 11, 1977).

The second part of the Secretary's argument that there is insufficient Section 236 contract authority for the operating subsidy program is that she must pay mandatory deep subsidies rather than operating subsidies. In the first place, even if there were insufficient funds to pay all mandatory deep subsidies and to pay operating subsidies, some allocation of funds between the two programs should be made. But in fact the Secretary is not preferring only mandatory deep subsidies. She is using a substantial portion of her available contract authority for deep subsidies not sanctioned by Congress.

The deep subsidy program was designed to subsidize rents for 20% of the tenants in Section 236 projects constructed *after* August 22, 1974. The Secretary admitted in affidavits filed in the District Courts below that she intended to use $2.9 million of her contract authority for projects which were constructed *prior* to August 22, 1974. J.A. 37-38. In a later affidavit filed in *Underwood v. Hills,* the amount allocated to such unauthorized deep subsidies was $6.8 million, which was more than half of the total amount allocated for all deep subsidies. *See* Exhibit A attached hereto. In her brief to this Court the Secretary implies that all deep subsidies are mandatory and that she will spend $50 million on deep subsidies. But if she maintains the same ratio between unauthorized and mandatory deep subsidies, she will be allocating approximately $25 million in contract authority to an unauthorized program while refusing to pay mandatory operating subsidies.

There is a telling inconsistency in the statements of HUD officials about inadequacy of available contract authority; since those officials have made contradictory assertions before Congress and the courts.

First, HUD has contended in this Court and in all of the lower courts which have considered this issue that it needs more contract authority if it is to pay operating subsidies, and that Congress' failure to release additional contract authority indicates its approval of HUD's refusal to pay those subsidies. Yet the former Secretary of HUD told Congress in 1976 that she was paying operating subsidies and that "No additional contract authority is required in this [Section 236] program."[35] Additionally, HUD asserted before the courts below that as of December, 1975 it needed all of the Section 236 contract authority to fund the interest reduction and deep subsidy programs. J.A. 32-42. But only three months later, the former Secretary of HUD reported to the Congress that she had an unobligated balance of $23 million in contract authority because of the cancellation or disapproval of projects which were not feasible.[36] Thus, one could not reasonably conclude that Congress, by failing to release additional contract authority, has knowingly validated the Secretary's refusal to pay operating subsidies.

**3. Section 8 Is Not an Adequate Substitute for the Operating Subsidy Program.**

The Secretary has also contended that implementation of the Section 8 program in financially distressed Section 236 projects has obviated the need to implement the operating subsidy program. Petitioners' Brief, at 23 n. 22.

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[35]*See* Department of Housing and Urban Development—Independent Agencies Appropriations For 1977: Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong. 2nd Sess., Part 6: Department of Housing and Urban Development, at 351. Several pages of this report are attached hereto as Exhibit B.

[36]*Id.*, at 352.

But the Section 8 program which provides financial assistance on behalf of lower-income families in the form of rental subsidies of four separate types—"set aside," and existing, newly constructed, or substantially rehabilitated housing,[37] is a wholly inadequate substitute for operating subsidies.[38] Obviously, if tenants and project owners had been receiving Section 8 assistance, there would have been no need for them to repeatedly sue HUD to compel payment of operating subsidies in an effort to obtain relief from the crushing burden of escalating utility and tax costs.

Under the Section 8 set aside program, which is designed to help only financially troubled projects which are HUD-insured or HUD-held, 100% of the units in a project may be assisted. However, set aside contract authority is made available to HUD area offices, which must determine that the infusion of Section 8 assistance will solve a project's cash flow problems and provide assurance of long term project viability before such assistance can be granted. There is no assurance that any given project, even if it satisfies all conditions precedent, will receive asistance under the Section 8 set aside program. More importantly,

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[37]Section 201(a) of the Housing and Community Development Act of 1974, 42 U.S.C. §1437(f).

[38]In his recent report to the Congress the Comptroller General of the United States criticized HUD's implementation of the Section 8 program and concluded that it has not provided housing to the number of low-income persons and stimulated the number of new housing starts originally anticipated. Report to the Congress by the Comptroller General, "Major Changes are Needed in the New Leased Housing Program," No. CED-77-19 (Jan. 28, 1977). Specifically, the Comptroller General found that HUD's implementation of the various Section 8 programs was too long delayed, that complex regulations and forms deterred participation by private landlords, and that the set aside program would not provide the same benefits as would the operating subsidy program. *Id.*, at 31, 33-34, and 50-53.

Section 8 set aside assistance has been made available for only 111,000 units in all HUD-insured or HUD-held multi-family projects. 24 C.F.R. §886 *et seq.* All of those units have been allocated (*See* Petitioners' Brief at 23 n. 22), and the Secretary consequently has no more Section 8 set aside funds with which to assist the 232,000 tenant families which she estimates are eligible for operating subsidies.

With respect to Section 8 housing assistance for existing units, Section 2(b)(1) of Pub. L. No. 94-375, "The Housing Authorization Act of 1976," provides that HUD's allocation of contract authority for Section 8 must conform, to the maximum extent practicable, to the Housing Assistance Plan (HAP) submitted by each locality to identify that community's needs for Section 8 assistance. HUD cannot allocate contract authority based on its own independent assessments of need.

Moreover, HUD regulations, 24 C.F.R. §882.110(c)(2), provide that rental subsidy payments for rent supplements, deep subsidies, Section 8 for existing housing, and state or local subsidies may not be made to more than 40% of the total number of units in each Section 236 project unless approved by the Regional Administrator in hardship cases. Consequently, at most only a fraction of the low-income tenants qualified for operating subsidies could be aided by these Section 8 subsidies.

Therefore, even proper and complete implementation of the Section 8 program would not obviate the need for the Section 236 operating subsidies mandated by Congress. The Secretary's substitution of her judgment for that of Congress and her preference for another subsidy program which provides no relief for the great

majority of Section 236 tenants has had a severely detrimental effect on the low-income tenants for which the Section 236 program and the operating subsidy provisions were designed.

**4. The Operating Subsidy Program Would Substantially Benefit Tenants Without Unduly Burdening HUD or Project Owners.**

The Secretary's final argument, which she asserted for the first time in her stay application to this Court in *Hills v. Underwood,* No. A-259, O.T. 1976, is that she reasonably decided not to implement the operating subsidy program because it would be administratively inefficient and of minimal benefit to tenants. Putting aside for the moment the merits of the Secretary's claim that the operating subsidy program is inefficient, this Court should consider the timing of her raising of the claim of inefficiency. If that were indeed her reason for not implementing the program it is incomprehensible that she did not present it in the District Courts below. The inference is plain that she created this rationale after the fact. Such *post hoc* rationalizations should be given no weight. *See, e.g., Continental Air Lines, Inc. v. C.A.B.,* 551 F.2d 1293, 1311 n. 81 (D.C. Cir. 1977), in which the Court declared:

> "Of course, on review, we must look at the findings, policies, and explanations made by the agency itself, rather than *post hoc* rationalization of counsel."[39]

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[39]The sound reasons behind this policy were expressed by Judge Adams in *American Iron and Steel Institute v. E.P.A.,* 526 F.2d 1027 (3d Cir. 1975):

> As a general principle, moreover, it is disturbing that courts should consider subsequently developed information

Moreover, the Secretary of HUD, in the only document which she has to support her claim that the operating subsidy program would be excessively costly to administer, greatly exaggerates the dimensions of the administrative burden imposed on HUD and project owners.[40] For example, she asserts that constant recalculations of increases in costs and utilities and of tenants' incomes are necessary. This assertion is contradicted by the Secretary's own draft instructions to project owners which require such recalculations only when rents are increased or when project owners who had included utilities in their rents change their policy and require tenants to procure and pay for their own utilities. *See* draft Operating Subsidy Handbook pp. 9-10, which pages are attached hereto in Exhibit

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to determine whether an administrative decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To entertain such information may encourage the use of the courts as mere extensions of a continuous administrative process. It may also encourage some administrators to issue decisions that may well be arbitrary at the time of promulgation hoping like Micawber that "something will turn up." Neither of these consequences would appear to enhance the efficiency of the courts or the confidence of citizens in the fairness of the administrative process. 526 F.2d, at 1077 n. 22.

*See also Securities and Exchange Commission v. Chenery,* 318 U.S. 80 (1943), on which both Judge Adams and the Court in *Continental Air Lines v. C.A.B.* relied.

[40]The Court should note that because this document (the Affidavit of Fred W. Pfaender submitted as Appendix G in support of the Stay Application in *Hills v. Underwood, supra*) and the facts and figures contained in it were never presented to the District Courts below and appeared after the decisions of those courts had already been rendered, tenants have had no opportunity to do any discovery to determine the basis for or accuracy of those figures. For this additional reason, this Court should accord these claims no weight. Furthermore, there is good reason to believe that the operating subsidy program, in operation, is as efficient as any other federal housing program. *See* Affidavit of William M. Kargman, filed in support of Plaintiff's Application to Vacate Stay in *Underwood v. Harris.*

C. In addition, the information required by the Secretary for implementation of the operating subsidy program is already available to HUD on forms designed for other purposes. For example, *see* p. 14 of the draft handbook, portions of which are included in Exhibit C, in which HUD directs project owners to transcribe tenants' rents from other forms already submitted to HUD for other purposes.

It is absolutely irrational for HUD to assert that this subsidy is onerous for project owners when project owners are among those suing HUD to compel payment of operating subsidies.[41] Moreover, any costs incurred by project owners will be passed on to tenants. Even so, tenants would receive substantial benefits from operating subsidies, despite the Secretary's suggestion to the contrary. HUD estimated in September, 1976 that the median maximum monthly operating subsidy per unit would be $15.43,[42] less administrative costs. HUD's estimates of those administrative costs have varied wildly.[43]

In June, 1976, HUD estimated[44] that payment of operating subsidies would consume $803,900 in staff

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[41]*Battles Farm Co. v. Hills, supra,* was a suit brought by the owners of four Section 236 projects in Massachusetts; *See also Taunton Gardens Co. v. Hills,* 421 F.Supp. 524 (D. Mass. 1976), *aff'd* 557 F.2d 877 (1st Cir. 1977).

[42]*See* para. 3 of the Affidavit of Fred W. Pfaender, Director, HUD Office of Loan Management, dated September 27, 1976, attached as Appendix G to the Stay Application in *Hills v. Underwood, supra.*

[43]In fact, there is reason to believe that monthly operating subsidies to each tenant will be far greater and administrative costs must less than HUD estimates. *See* para. 3 of the Affidavit of William M. Kargman filed in support of Plaintiff's Application to Vacate Stay in *Underwood v. Harris.*

[44]Affidavit of James J. Tahash in *Underwood v. Hills,* dated June 17, 1976 and filed in the United States Court of Appeals for the District of Columbia Circuit as Add. M-

costs to project owners, which would result in a rent increase of $2.38 a unit each year, that is, $0.18 a month. However, by September, 1976, HUD's estimated costs to project owners had increased to $1,050,300 in staff costs plus $9.65 million in "additional costs" for such overhead expenses as "bookkeeping systems, tenant files, efforts to locate eligible tenants . . . [and] increased auditing costs and management fees."[45] Even accepting these highly questionable figures, tenants would still be receiving a total operating subsidy of $66.2 million[46] at a cost of $10.7 million, a net gain of approximately $55 million. Those costs do not "substantially offset any benefit tenants might otherwise experience from payment of the subsidy", as HUD claims. Petitioners' Brief, at 24.

But even if the operating subsidy program were inefficient, it is not the Secretary's prerogative to refuse to enforce the law.

> . . . [N]owhere does our Constitution extol the virtue of efficiency and nowhere does it command that all our laws be fiscally wise. It does most clearly, however, state that laws, good or bad, be enacted by the Congress and enforced by the President. *Guadamuz v. Ash, supra,* 368 F.Supp., at 1243.

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lm to the Motion of the Federal Defendants-Appellants for a Stay Pending Appeal, a portion of which is attached hereto as Exhibit D.

[45]*See* para. 6 of the Affidavit of Fred W. Pfaender, dated September 27, 1976 which was filed in this Court in support of the Stay Application in *Hills v. Underwood.*

[46]*See* para. 3 of the Affidavit of Fred W. Pfaender, estimating that $66.2 million would be the amount of operating subsidies due tenants for the period February 18, 1975 through August, 1976.

## III.
## THESE CASES NO LONGER WARRANT REVIEW BY THIS COURT.

The single issue presented in each of these cases is the same—"[w]hether 12 U.S.C. (Supp. V) 1715z-1(f)(3) requires the Secretary of Housing and Urban Development to establish and implement an operating subsidy program." *Abrams* Pet., at 2; *Ross* Pet., at 2; Petitioners' Brief, at 2. This Court granted the petitions for writs of certiorari and consolidated these cases on May 23, 1977.[47]

Amici now urge this Court to dismiss the petitions for writs of certiorari as improvidently granted pursuant to Supreme Court Rules 19(1)(b), 25 and 60. The construction of the operating subsidy provisions of the Housing and Community Development Act of 1974 is no longer of significance because of their amendment in Section 206 of Pub. L. No. 95-128. The enactment of the operating subsidy provisions of the Housing and Community Development Act of 1977 ensures that the issue raised by Petitioners will never arise again.[48] Furthermore, since these amendments make it indisputable that implementation of the operating subsidy program is mandatory effective October 1, 1977 and that the excess rental reserve fund can be expended directly without the use of the Secretary's Section 236 contract authority,[49] a decision by this Court in the

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[47]*Harris v. Ross*, No. 76-1234, *cert. granted* ..... U.S. ....., 97 S.Ct. 2630; *Harris v. Abrams*, No. 76-1261, *cert. granted* ..... U.S. ....., 97 S.Ct. 2630.

[48]Significantly, in *Ross* the judgment subject to review ordered the Secretary to implement the program prospectively and all operating subsidy payments have been made. The judgment in *Abrams* concerns only a six month claim for retroactive operating subsidies to tenants in a single Section 236 project now receiving housing assistance payments under the Section 8 program.

[49]*See* argument *supra* in text accompanying footnotes 8-19 and 21-22.

*Ross* and *Abrams* cases would be of no precedential value.

Thus these cases no longer pose a continuing issue of national housing policy or an important question of federal law. This Court's decision in *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955), compels dismissal of the writs as the proper course in these circumstances. In *Rice* the issue was whether a privately owned cemetery could properly defend a suit for breach of a burial contract because the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. Following consideration of a petition for hearing,[50] the Court was informed of the passage of a new Iowa statute which settled the issue prospectively although it afforded the petitioner in *Rice* no relief. Speaking through Mr. Justice Frankfurter, this Court declared:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such cases. Nor does it sit for the benefit of the particular litigants. *Rice, supra*, 349 U.S., at 74.

Accordingly the petition for rehearing in *Rice* was granted and the writ, previously granted, was dismissed.[51] *See also District of Columbia v. Sweeney*,

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[50]The lower court's decision was initially affirmed by an equally divided Court. 349 U.S. at 73, citing 348 U.S. 880.

[51]In *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), Mr. Chief Justice Taft explained the reasons underlying Rule 19:

> . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . .

310 U.S. 631 (1940), where certiorari was denied "in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

*Ross* and *Abrams* no longer present an issue of national housing policy or of federal law which it is necessary for this Court to decide pursuant to Rule 19 of the Supreme Court Rules, and involvement of this Court in these cases is consequently no longer warranted.

## CONCLUSION.

The Secretary of HUD has a mandatory duty to make operating subsidy payments on behalf of low-income tenants and has unlawfully refused to do so. Therefore, should this Court decide these cases on the merits, it should affirm the judgments of the courts of appeal.

Respectfully submitted,

JAMES C. STURDEVANT,
JOHN A. DZIAMBA,
DENNIS J. O'BRIEN,
Connecticut Legal Services, Inc.,

FLORENCE WAGMAN ROISMAN,
RENO, ROISMAN AND SHAPIRO,
JOAN E. PILVER,
RAYMOND RICHARD NORKO,
Legal Aid Society for Hartford County,

JOHN E. MCDERMOTT,
MARY S. BURDICK,
PATRICIA M. TENOSO,
Western Center on Law and Poverty, Inc.,

*Attorneys for Amici Curiae.*

## EXHIBIT A.

### Affidavit of Carla A. Hills.

In the United States District Court, for the District of Columbia.

Myrna Underwood, et al. Plaintiffs, v. Carla A. Hills, et al. Defendants. Civil Action No. 76-0469.

Carla A. Hills, being duly sworn, deposes and says:

1. I am the Secretary of the Department of Housing and Urban Development. All of the functions, powers and duties of the Department, including those powers conferred by Section 236 of the National Housing Act, as amended, are vested in the Secretary, 12 U.S.C. 1702.

2. It is the purpose of this affidavit to inform the Court of the most current data available with respect to the information set forth in paragraphs 4 and 5 of my affidavit previously submitted in this case.

3. As of February 29, 1976, the Department had an unreserved balance of contract authority in an amount aggregating $48.1 million for contracts authorized by Section 236 of the National Housing Act, as amended. However, this total includes $8.3 million in program reservations which had been made but not formally recorded on the Department's accounting records. Therefore, as a realistic matter, the Department had available Section 236 contract authority aggregating only $39.8 million on that date.

4. The Department has allocated this $39.8 million unreserved balance of Section 236 contract authority in the following manner:

a) $15.9 million in contract authority for bona fide commitments to State-aided Section 236 projects.

b) $5.0 million in contract authority for bona fide commitments to non-State-aided Section 236 projects.

c) $3.1 million in contract authority to amend contracts for interest reduction payments on State-aided Section 236 projects.

d) $3.2 million in contract authority to amend contracts for interest reduction payments on non-State-aided Section 236 projects.

e) $5.8 million in contract authority for deep subsidy payments for Section 236 projects pursuant to Section 236(f)(2) of the National Housing Act, as amended.

(f) $6.8 million in contract authority for deep subsidy payments to Section 236 projects which had received a commitment by the Department for interest reduction payments prior to August 22, 1974, but which were not finally endorsed nor receiving interest reduction payments until after that date.

/s/ Carla A. Hills
CARLA A. HILLS
Secretary

Subscribed and sworn to before me on this 7th day of May, 1976.

/s/ Bernard E. Banks
NOTARY PUBLIC
My Commission Expires June 30, 1976

**EXHIBIT B.**

Department of Housing and Urban Development—Independent Agencies Appropriations for 1977.

Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Ninety-Fourth Congress, Second Session.

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Subcommittee on HUD—Independent Agencies, Edward P. Boland, Massachusetts, *Chairman.*

Joe L. Evins, Tennessee
George E. Shipley, Illinois
J. Edward Roush, Indiana
Bob Traxler, Michigan
Max Baucus, Montana
Louis Stokes, Ohio
Yvonne Brathwaite Burke, California
Burt L. Talcott, California
Joseph M. McDade, Pennsylvania
C. W. Bill Young, Florida

G. Homer Skarin, Richard N. Malow, and Paul E. Thomson, *Staff Assistants.*

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Part 6, Department of Housing and Urban Development.

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Printed for the use of the Committee on Appropriations.

Department of Housing and Urban Development—Independent Agencies Appropriations for Fiscal Year 1977.

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Tuesday, March 30, 1976.

Department of Housing and Urban Development Testimony of the Secretary.

. . . .

[end of p. 1 of original text]

Best Copy Available



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

HOUSING PRODUCTION AND MORTGAGE CREDIT
FEDERAL HOUSING ADMINISTRATION

RENTAL HOUSING ASSISTANCE PROGRAM
(Section 236)

PROGRAM HIGHLIGHTS

| | ACTUAL 1975 | BUDGET ESTIMATE 1976 | CURRENT ESTIMATE 1976 | ESTIMATE 1977 | INCREASE + DECREASE - 1977 vs 1976 |
|---|---|---|---|---|---|
| | | | (Dollars in thousands) | | |
| Contract Authority: | | | | | |
| Receipts from one-year subsidies | ... | ... | $23 | $68 | +$45 |
| Used | $56,336 | $73,163 | 102,049 | 13,272 | -88,777 |
| Unused balance | $25,036 | ... | 23,000 | ... | -23,000 |
| Budget Authority: | | | | | |
| Recoveries | ... | ... | 23 | 68 | +45 |
| Obligated (net) | 2,259,552 | 2,936,520 | 4,071,376 | 520,272 | -3,551,104 |
| Lapse | 903 | ... | 9,700 | ... | -9,700 |
| Unobligated balance | 5,001,053 | ... | 920,000 | ... | -920,000 |
| Number of Units Reserved | 22,614 | 32,500 | 30,000 | ... | -30,000 |
| Units Started | 19,421 | 40,000 | 60,000 | 20,000 | -40,000 |
| Unit Occupancy (End of period) | 400,360 | 508,000 | 459,000 | 555,000 | +96,000 |

SUMMARY OF BUDGET ESTIMATES

1. SUMMARY OF BUDGET REQUEST

No additional contract authority is required in this program. The anticipated use of the balance of Section 236 funds currently available is as follows:

| | ACTUAL 1975 | ESTIMATE 1976 | TRANSITION QUARTER | ESTIMATE 1977 |
|---|---|---|---|---|
| | | (Dollars in Thousands) | | |
| Bona fide commitments | $56,313 | $65,000 | ... | ... |
| Prog subsidy | ... | 30,000 | $10,000 | $10,000 |
| Amendments to prior contracts | ... | 6,777 | ... | 3,000 |
| Subsidy for taxes and utilities | 23 | 272 | 68 | 272 |
| Total | 56,336 | 102,049 | 10,068 | 13,272 |

E-5

[beginning of p. 352 of original text]

Rental Housing Assistance Program

The reservation of funds for bona fide commitments will be completed in 1976 with the funding of an estimated 30,000 units. The new deep subsidy program implemented in 1976, will assist approximately 25,000 units.

The Housing and Community Development Act of 1974 authorized a program of subsidies for taxes and utilities which has not been implemented since other more equitable means of assisting all insured projects—not just Section 236—were being developed. Assistance to projects in financial difficulty will be provided through the Section 8 program.

The tax and utility subsidy program currently is the subject of litigation. As a result of several cases which already have had preliminary and final orders issued, the Department currently is estimating a requirement for about $272 thousand annually for such subsidies.

2. *CHANGES FORM ORIGINAL 1976 BUDGET ESTIMATES*

Both the original and current 1976 estimates propose funding of the remaining bona fide units, amendments to previously approved projects, and implementation of the deep subsidy program.

Although the number of units processed in 1975 roughly equalled the budget forecast, *the cancellation or non-approval of projects proven infeasible has substantially reduced the number of projects which actually received funding. This shortfall in usage resulted in an unobligated balance carrying over into 1976.* [Emphasis added.]

The savings which resulted from such actions in 1975 will be offset to some extent, by the cost of the deep subsidy program. Field surveys have indicated a significantly greater number of units eligible for conversion to the deep subsidy program, and higher per unit costs. The estimate for this category has been increased accordingly. *The increment in deep subsidy requirements in 1976 will not totally use up the 1975 shortfall, however, and an unobligated balance of $23 million is anticipated at the end of 1976.* [Emphasis added.] This balance will be fully utilized during the Transaction Quarter and 1977.

*EXPLANATION OF INCREASES AND DECREASES*

Decreases in the use of contract and budget authority and in the levels of unit reservations and construction starts reflect the completion of activity under the Section 236 program. By the end of 1976, all units will have been allocated fund reservations, eligible units will have received a major portion of the initial year funding under deep subsidy, and virtually all projects will have reached the stage of construction start. Activity in 1977 will be limited to second year — deep subsidy funding, amendments to prior contracts and such operating subsidies for taxes and utilities as may be required.

*PROGRAM DESCRIPTION—DEEP SUBSIDY PROGRAM*

Under the original Section 235 program, the only subsidy available was for the purpose of mortgage interest reduction payments. The maximum subsidy available to a project was set at the difference between the monthly payment for principal, interest, and mortgage insurance premium on the outstanding. . . .

**EXHIBIT C.**

U.S. Department of Housing and Urban Development
Housing

Transmittal

1. *This Transmits the Following:*

   Handbook ..... Operating Subsidy Handbook dated .....

2. *Explanatic ı of Material Transmitted:*

   Provides instructions for computing operating subsidies pursuant to the court order in the case *Underwood v. Hills* which compels the Department to pay operating subsidies in accordance with Section 212(2) of the Housing and Community Development Act of 1974. Provisions for retroactive payments of operating subsidies are included for those cases where HUD is required to make retroactive payments by court order. Form HUD-9816 is being initiated to allow for computation and proper assignments to tenants of operating subsidies.

   [end of cover page of original text]

[5.] . . .

d. *Changes in Baseline.* Except as discussed in paragraph 5(b), a Baseline, once established, remains unchanged over the life of a project unless, subsequent to its establishment, a project-paid utility is passed on to tenants or, in rare cases, a tenant-paid utility is passed back to the project. In such cases, a revised Baseline is established using the procedure discussed in paragraph 8.

6. *DETERMINING TAX AND UTILITY COSTS INCLUDED IN LAST HUD-APPROVED RENT*

*INCREASE.* This data is drawn from Column D of the Form HUD-92547 used in computing the last HUD-approved Rental Schedule Form HUD-92458 (see example in Appendix 1). This determination is not necessary on projects which have not had a rent increase subsequent to sustaining occupancy.

a. *Effect of Future Rent Increases.* Whenever a rent increase is approved by HUD subsequent to a project's becoming eligible for an operating subsidy, tax and utility cost data must be drawn from Column D of the Form HUD-92547 used in computing the rent increase. This data will be used, along with the Baseline data, to establish the Maximum Operating Subsidy (PUPM) applicable to the new rent increase.

7. *DETERMINING MAXIMUM OPERATING SUBSIDY (PUPM)* Once the Baseline and the tax and utilities costs included in the last HUD-approved rental schedule have been established, the Maximum Operating Subsidy (PUPM) is determined as follows:

a. *Formula.* Any increase in the cost of taxes and utilities from the Baseline to the last HUD-approved rent increase must be divided by the product of the number of units at the project times 12 months to arrive at an average per unit per month (PUPM) amount as follows:

[end of p. 9 of original text]

*Increase*
units x 12 — Maximum Operating Subsidy (PUPM)

The format shown in Appendix 2 is used in making this computation.

b. *Example.* Project "A" reached sustaining occupancy on January 1, 1974, and was processed for a $12 average PUPM rent increase on December 1, 1975. The local office compares the costs of property taxes and utilities payable by the owner for January 1, 1974, and December 1, 1975, as shown in Appendix 1. Using the above formula, the Maximum Operating Subsidy (PUPM) is computed as $4.38.

c. *New Maximum Operating Subsidy (PUPM).* For any project eligible for an operating subsidy, a new Maximum Operating Subsidy (PUPM) must be established when either the Baseline or tax and utility costs included in the last HUD-approved rent increase are changed. This will occur whenever:

(1) A rent increase (or decrease) is approved, resulting in new tax and utility costs included in last HUD-approved rent increase.

(2) A project-paid utility is passed on to tenants, resulting in a revised Baseline.

(3) A tenant-paid utility is passed on to the project, resulting in a revised Baseline.

8. *PERSONAL BENEFIT EXPENSE (PBE).* Personal Benefit Expense (PBE) is a utility allowance that is not included in the rent paid to the housing owner since tenants pay the utility bills directly to the utility company. The requirements for establishment of a PBE are contained in a Final Rule, 236.55, published in Volume 41, Number 190, of the Federal Register, dated September 29, 1976.

In the event a PBE allowance is approved for a project, the following procedures should be taken into consideration.

[end of p. 10 of original text]

. . .

for an operating subsidy if the amount paid towards basic rent exceeds that tenant's Income Qualification Level. The actual operating subsidy payable for each tenant is dependent upon the tenant's Income Qualification Level and liability for basic rent in the absence of operating subsidy and can range from 1¢ to the Maximum Operating Subsidy (PUPM) applicable to the project in which he or she resides. In no case may the actual operating subsidy exceed the Maximum Operating Subsidy (PUPM). Tenants paying in excess of basic rent are not eligible for operating subsidies because Section 236(f)(3) of the Act specifies that operating subsidies are applicable to basic rent tenants.

b. *Specific Criteria.* Form HUD-9816 and complete instructions for determining if tenants are qualified for operating subsidies and the amount of subsidy payable on their behalf is provided in Appendix 5. The adjusted monthly income as shown on the current FHA Form 3131 or FHA Form 3132 is entered in Column 6 for each tenant in residence during the billing month. Amounts in Column 6 are multiplied by the Income Percentage Factor (entered in the heading of Column 7) to compute the Income Qualification Level for each tenant (entered in Column 7). The operating subsidy pay-

able on behalf of qualified tenants (those for which the amount in Column 11 exceeds the amount in Column 7) is entered in Column 14 and will be the lesser of:

(1) The Maximum Operating Subsidy (PUPM) (Column 8).

(2) The net rent increase payable by the tenant (Column 12 minus Column 13).

(3) An amount necessary to reduce the rent payable by the tenant to the amount of the Income Qualification Level (Column 11 minus Column 7).

[end of p. 14 of original text]

**EXHIBIT D.**

**Affidavit of James J. Tahash.**

United States District Court, for the District of Columbia.

Myrna Underwood, et al. Plaintiffs v. Carla A. Hills, et al. Defendants. Civil Action No. 76-649.

James J. Tahash, being duly sworn, deposes and says:

1. I am the Director of the Insured Project Mortgage Division of the Office of Loan Management, Department of Housing and Urban Development (HUD). My responsibilities as Director include the development and recommendation of policies and establishment of operating plans and procedures for the payment of operating subsidies pursuant to Section 236(f)(3) and (g) of the National Housing Act, as amended (12 U.S.C. 1715z-1(f)(3) and (g)). The information set forth in this affidavit is based upon my personal knowledge and information supplied to me by members of my staff.

2. The purpose of this affidavit is to inform the Court of the steps which must be taken to implement the operating subsidy program pursuant to the Court's Order of June 8, 1976, and to furnish our best estimate of the time and cost involved in taking those steps. This affidavit is submitted in support of the Government's application for a stay, and will demonstrate why a stay is needed. The Order directs the Secretary of HUD to:

> a) determine the initial operating expense level for all housing projects in the United States assisted under Section 236;

b) determine whether the increase in the cost of utilities and local property taxes for each of the housing projects has been reasonable and comparable to cost increases affecting other rental projects in the relevant community; and

. . . .

15. Based on our estimate that tenants in 58 percent (232,000) of the 400,000 units will qualify for an operating subsidy and that the median maximum per unit per month subsidy for all projects will be $15.43 based on projections for FY 1976, we estimate that the gross maximum subsidy payable per month for all projects during the retroactive period will amount to $3,579,760. The balance in the Section 236(g) reserve fund available to pay operating subsidies after deducting $18 million needed to repay project owners for overpayments into the reserve fund is $28 million. At the above monthly rate, the $28 million would be adequate to make 7 of the 16 months of the retroactive payment period prescribed by the Court.

16. The estimated personnel costs for the retroactive implementation are based on effective costs per man-year of $9,000 for project owner staff and $16,500 for HUD staff. It is estimated the HUD staff costs of retroactively implementing the program will be $650,-100 and the project owner staff costs will be $803,700, thus bringing the total cost and time of retroactively implementing the program to $1,453,800 and 127.8 man-years.

17. The retroactive implementation will have an adverse effect on projects. Since the $803,700 in additional project staff costs will be included in allowable operating expenses in future rent increase computations, rents for these projects can be expected to increase

a minimum of $2.38 per year *solely* as the result of increased staff costs relative to the retroactive implementation of the operating subsidy program. Rents can be expected to increase even more as the result of yet unquantified increases in other administrative costs such as bookkeeping and computer costs. It should be noted that because of a factor used in the rental computation to adjust for normal vacancy losses and management fees, a $1.00 increase in allowable expenses actually produces an increase in basic rents of about $1.18.

18. Since the $15.43 maximum per unit per month operating projection mentioned in paragraph 15, *supra,* is a median figure, it is anticipated that in projects where a number of tenants receive operating subsidies substantially below this amount, the necessary increase in administrative costs will result in a rent increase which will *exceed* any benefits received from operating subsidies. Additionally, such administrative expenses will result in rent increases to all tenants, not just those benefiting from operating subsidies.

19. The above estimates of time and cost give a picture of the massive effort and cost which it will take to implement the operating subsidy program. Additional information relating to the costs of preparing and implementing the HUD training programs and the Notice and Handbook preparation and clearance is being prepared by this office to supplement this affidavit and will be submitted as soon as it is available.

/s/ James J. Tahash
JAMES J. TAHASH, DIRECTOR OF THE INSURED PROJECT MORTGAGE DIVISION, OFFICE OF LOAN MANAGEMENT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Subscribed and sworn to before me on this 17th day of June, 1976.

/s/ Bernard G. Banks
NOTARY PUBLIC

My Commission Expires June 30, 1976

Office - Supreme Court, U.S.
FILED
MAR 11 1982
ALEXANDER L. STEVAS
CLERK

Nos. 76-1234 and 76-1261

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

BARBARA ROSS, ET AL.

---

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

HILDA ABRAMS, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS*

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**MOTION TO VACATE**

---

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

**TABLE OF AUTHORITIES**


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*United States* v. *Munsingwear, Inc.*, 340 U.S. 36 ..... 3

Statute:

National Housing Act, 12 U.S.C. (& Supp. IV) 371 *et seq.*:

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Section 236(f)(3), 12 U.S.C. (& Supp. IV) 1715z-1(f)(3) ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 76-1234

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

BARBARA ROSS, ET AL.

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No. 76-1261

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., PETITIONERS

*v.*

HILDA ABRAMS, ET AL.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS*

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**MOTION TO VACATE**

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The Solicitor General, on behalf of the Secretary of Housing and Urban Development and the other petitioners, requests this Court to vacate the judgments of the courts of appeals and to remand these cases to the district court for dismissal when the parties jointly so move.

1. These cases present the question whether the Secretary of Housing and Urban Development may decline to implement the "operating subsidy" program established by

Section 236(f)(3) of the National Housing Act, 12 U.S.C. (& Supp. IV) 1715z-1(f)(3).[1] The courts of appeals in these cases held that the statute required the Secretary to implement the program. *Ross* v. *Community Services, Inc.*, 544 F. 2d 514 (4th Cir. 1976); *Abrams* v. *Hills*, 547 F. 2d 1062 (9th Cir. 1976). This Court granted the Secretary's petitions for certiorari on May 23, 1977. 431 U.S. 928.

Subsequent to the filing of briefs, the parties entered into negotiations to settle these cases, together with a nationwide class action (*Underwood* v. *Harris*, Nos. 76-1603 and 76-1650 (D.C. Cir.)) in which this Court granted a stay (429 U.S. 892 (1976)), and a number of other cases involving the same issues in various federal courts. This Court accordingly postponed oral argument in these cases, and, on December 4, 1978, granted the Solicitor General's motion to refer them to the appropriate district courts to consider settlement. 439 U.S. 1001.

On April 5, 1979, the United States District Court for the District of Columbia approved a stipulation of settlement in the *Underwood* case and transferred the case to the United States District Court for the Central District of California for the administration of the distribution of the fund created by the stipulation among the "eligible recipients" (which included every tenant who resided in a Section 236 project between February 1, 1975 and September 30, 1977, and who paid in excess of 25-30% of his or her income for rent). The United States District Court for the District of Maryland approved a stipulation for settlement in *Ross* on June 26, 1979, and the United States District Court for

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[1] Under the program, federal funds were to be provided to housing project owners to reduce the rental charges to lower-income tenants residing in housing projects assisted under Section 236 of the National Housing Act, 12 U.S.C. (& Supp. IV) 1715z-1.

the Central District of California approved a stipulation for settlement in *Abrams* on September 17, 1979.[2]

The stipulations provide that when the fund has been distributed to the "eligible recipients," the parties in each of the cases will file joint motions in the respective district courts requesting the entry of judgments of dismissal (*Underwood* Stipulation at 16, para. 7; *Abrams* Stipulation at 20, para. 7). Although the distribution to the affected tenants was completed in September 1981, pending before the *Underwood* court are motions for attorney's fees and HUD's application for the return of the unexpended principal of the settlement fund. Despite the pending issues, there is no longer a live case or controversy concerning the legal issue decided by the courts of appeals, which this Court had determined to review.

"The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Accordingly, in light of the intervening mootness, the judgments of the courts of appeals should be vacated, and the cases should be remanded to the district courts for dismissal when the parties jointly so move. See *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *Alabama* v. *Davis*, 446 U.S. 903 (1980).[3]

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[2]We are lodging with the Clerk of this Court copies of the stipulations of settlement in *Underwood* and *Abrams*. The *Ross* Stipulation is the same as that in *Abrams*. See *Underwood* Stipulation at 3, para. 1.

[3]There is no reason for the Court to defer action on these cases pending the resolution of the attorney's fee motions and HUD's application now before the *Underwood* court. Any further proceedings in the district courts will be totally unrelated to the issue upon which this Court granted certiorari.

Counsel for respondents Ross and Abrams have authorized us to state that they do not object to this proposed procedure.

Respectfully submitted.

REX E. LEE
*Solicitor General*

MARCH 1982

DOJ-1982-02